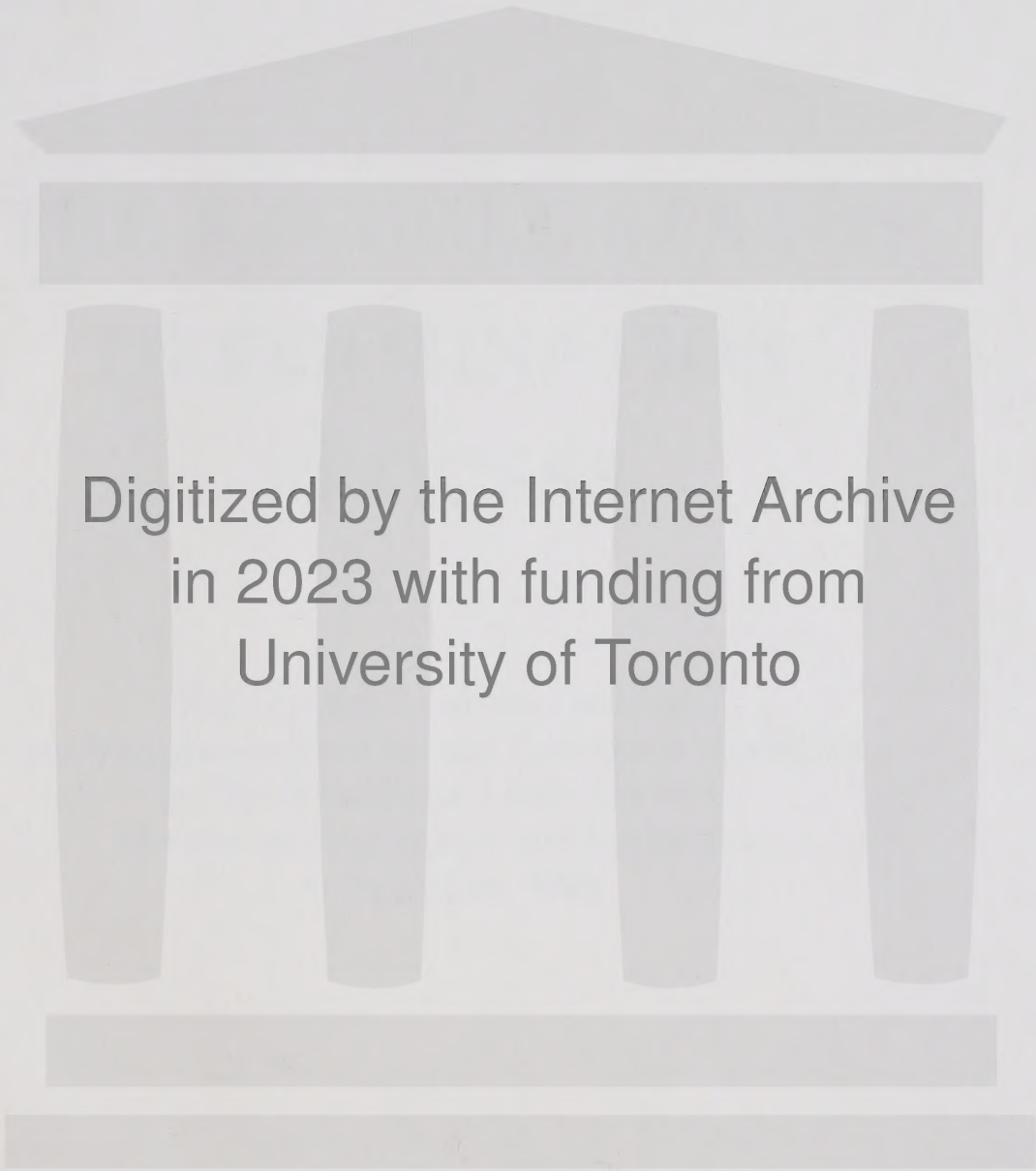


Government of Canada
Office of the Minister
Employment and Immigration

Gouvernement du Canada
Cabinet du Ministre
Emploi et Immigration

THE REFUGEE STATUS DETERMINATION PROCESS

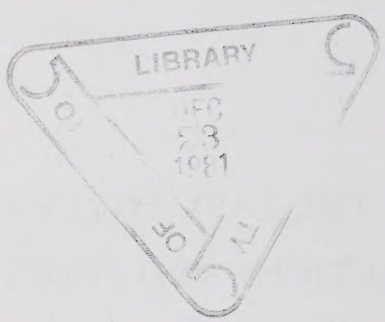
This is a Report of the Task Force
on Immigration Practices and Procedures established
by The Honourable Lloyd Axworthy
Minister of Employment and Immigration
in September, 1980

November, 1981

Canada

THE REFUGEE STATUS DETERMINATION PROCESS

A REPORT OF THE TASK FORCE ON
IMMIGRATION PRACTICES AND PROCEDURES



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Employment and Immigration

Cabinet du Ministre
Emploi et Immigration

September 15, 1981

The Honourable Lloyd Axworthy,
Minister of Employment and Immigration,
Ottawa, Ontario.
K1A OJ9

Dear Mr. Axworthy,

On behalf of the Task Force on Immigration Practices and Procedures, I am transmitting to you our final report on the "Refugee Status Determination Process".

We observe that you have recently published our report entitled "Foreign Domestic Workers on Employment Authorizations" and that you have also published a discussion paper based upon our report entitled "The Exploitation of Potential Immigrants by Unscrupulous Consultants". Our work in other areas has taken a variety of forms, not always appropriate for publication as formal reports.

However, we do recommend that "The Refugee Status Determination Process" be published in its entirety and at the earliest opportunity. We perceive that the existing process is ripe for reassessment and hope that this product of our examination and deliberations will assist in leading to both short term adjustments and broader policy changes. Although our primary focus has been the operation of the process within the existing legislative context, we have also suggested a more general change in the process which would require amendment of the present Act.

Yours sincerely,

W. G. Robinson
Chairman

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BACKGROUND

The Task Force on Immigration Practices and Procedures was established by the Honourable Lloyd Axworthy in September of 1980 to advise the Minister on the apparent objectives of the Immigration Act (1976) and on the extent to which these objectives are being met under existing regulations, procedures and practices, bearing in mind the need both to protect the interests of Canada and to achieve fairness in the treatment of individuals.

The following areas were specified by Mr. Axworthy as giving rise to concern:

1) the use of employment authorizations;
2) problems surrounding the representation of applicants;
3) procedures for the determination of refugee status;
4) the application process; and
5) the use of Ministerial discretion.

In addition, during the life of its mandate, the Task Force was called upon to offer its advice and assistance in relation to other areas such as the annual setting of levels of immigration and the "settlement" services available to immigrants.

The members of the Task Force were as follows:

W. G. Robinson (Chairman)
Barrister, Vancouver

Carter Hoppe,
Barrister, Toronto

Ed Ratushny
Law Professor, Ottawa

David Matas
Barrister, Winnipeg

Manon Vennat
Barrister, Montreal

SUMMARY OF OBSERVATIONS, CONCLUSIONS AND RECOMMENDATIONS

CHAPTER ONE: INTRODUCTION

A significant feature of the refugee determination process in Canada is that the claimant is not provided an opportunity to be heard orally by the decision-maker. Another important feature is that all claims are determined centrally and administratively in the first instance. In contrast, a brief survey reveals that oral hearings are an integral part of the decision-making process in a number of Eurpean countries, whether the decisions are made administratively or judicially, centrally or locally.

Canada has met its legal obligations in relation to the U.N. Convention and has gone further. However, the increase in the volume of claims may create an impression of arbitrariness. The general U.N. recommendations for the determination of refugee status are only meant to provide minimal requirements. The Task Force is of the view that our procedures should also reflect Canadian standards of procedural fairness as they are manifest in our general legal concept of a "fair hearing".

CHAPTER TWO: ESTABLISHING THE CLAIM

A. The Standard of Proof

The Task Force is of the view that the general principle, in dubio pro reo or "the benefit of the doubt", should be formally adopted by the Minister by way of an instruction to the Refugee Status Advisory Committee to apply it as a central guideline not only in relation to credibility but in relation to the application of the refugee definition to particular cases.

B. The Refugee Definition

Section 2(1) of the Immigration Act adopts the definition of "Convention refugee" directly from the U.N. Convention to which Canada is a signatory. While the Act does not incorporate the remainder of the Convention, it may still form part of our law. Moreover, as a matter of policy, we should respect its provisions. Therefore, in applying the definition of "Convention refugee" in the Immigration Act, the Minister should also give effect to the remainder of the Convention which has not been incorporated into the Act and which is not in direct contradiction to the Act.

The Task Force believes that guidelines from the Minister to the Refugee Status Advisory Committee would be valuable to assist that body in providing advice to the Minister in individual cases. The Task Force has drawn upon a variety of sources in compiling "Draft Guidelines" for this purpose.

Recommendation: The Minister should provide guidelines to the Refugee Status Advisory Commitee with respect to the application of the refugee definition. These should be kept under constant review and published in the Immigration Manual.

A well-founded fear of persecution may relate to economic factors. The Task Force sees little value in attempting to include specific reference to economic circumstances in the refugee definition.

C. The Problem of Credibility

It is crucial that the claimant receive the benefit of the doubt in assessing his credibility, particularly where no opportunity is provided to explain what may be perceived by the assessor as misrepresentations,

inconsistencies and concealments. Otherwise, there is the danger of falling into crystallized patterns of skepticism.

The Task Force is of the view that it would also be valuable for the Minister to provide guidelines to the Refugee Status Advisory Committee for the assessment of credibility. Again, the Task Force proposes Draft Guidelines for the consideration of the Minister.

Recommendation: The Minister should provide guidelines to the Refugee Status Advisory Committee with respect to the assessment of credibility.

CHAPTER THREE: INLAND PROCEDURE

A. Introduction

The Immigration Act specifically provides that the claimant has a right to counsel during the Examination and requires that he be so informed. However, there may also be a need for legal advice during the initial interview by the port of entry interviewing officer, as soon as an intention to claim refugee status has been indicated.

Recommendation: A potential refugee claimant should have a right to counsel immediately upon indication of his intention to ask for refugee status and should be informed of this right.

Employment and Immigration Canada is commended for preparing the pamphlet entitled "Claiming Refugee Status in Canada, Information for Claimants". However, the policy is to restrict its distribution for handout to those who are potential refugees or their representatives and not to display it on racks or counters with the Commission's other publications.

Recommendation: The pamphlet on refugee claims procedure should be made

available for general distribution through display at ports of entry and at immigration centres together with other immigration literature.

Recommendation: The Immigration Manual should provide that both refugee examinations and the inquiries of would-be refugee claimants should be held, on the request of the claimant, at the immigration centre nearest the intended destination provided that the claimant pay for inland transportation and subject to the availability of necessary facilities.

B. The Examination

The transcript of the examination of the claimant under oath by a senior immigration officer forms the central evidentiary basis for all subsequent decision-making. The major difficulty created by reliance upon the transcript, to the exclusion of oral testimony before the decision-maker, is in relation to the assessment of credibility.

In this context, correct translation becomes of overwhelming importance.

Recommendation: The pay schedule for translators should be reviewed to permit the retention of professional translators or, at least, competent translators who have French or English as a first language.

Recommendation: The claimant should not be discouraged from submitting country background information during the examination. The Commission should provide relevant country background information to the senior immigration officer conducting an examination.

There are a number of problems associated with the current Guidelines for conducting examinations. Where counsel has interviewed the

claimant beforehand, the details of the claim may be drawn out in a logical and cohesive manner when counsel questions the claimant first. The Task Force is of the view that it is inappropriate for questioning on the examination to commence with the senior immigration officer seeking "basic data".

Recommendation: The current options for conducting examinations should be eliminated in favour of a format whereby the claimant is permitted to present his entire claim prior to questioning, apart from questions of clarification, by the senior immigration officer. The claimant should be encouraged to make a full and complete presentation of his case and should be informed, specifically, that his statements will be treated as confidential.

Ideally, the person who makes the decision should also assess demeanour. Nevertheless, should the existing situation prevail, of exclusive reliance upon the transcript, further consideration should be given to having the examinations conducted by adjudicators or specially trained SIOs and having them comment upon the credibility of the claimant.

Recommendation: If the present system of examinations is to continue, they should be conducted by adjudicators or, as an alternative, by senior immigration officers who are specially trained for this purpose. In such circumstances, the person conducting the examination should make a recommendation as to the credibility of the claimant which should be made fully available to him for possible written comment to the RSAC.

C. The Refugee Status Advisory Committee

The problem which the Task Force sees in relation to the RSAC is institutional. First of all, the Act, itself, suggests an assessment on the basis of the transcript and does not make reference to oral hearings by the RSAC.

Secondly, the RSAC has not received the stature and related resources to deal appropriately with the important function which has been assigned to it. Recommendation: Additional full-time and part-time members should be appointed to the RSAC, sufficient in numbers to cope adequately with the existing workload and taking into account changes which might be implemented as a result of this Report. Members should sever their ties with other departments or be drawn from outside the public service. When the RSAC sits in evenly numbered panels, a tie vote should be resolved in favour of the claimant.

As a result of the process of screening out "manifestly unfounded" claims, about one-half of the transcripts are not actually examined by the RSAC. The backlog of cases and resultant delay in processing have also led to categories of priority processing. However, a system of priority processing is only a reaction to the symptoms of the problem and creates problems of its own.

Guidelines indicating when claims should be considered to be "manifestly unfounded" may not have been drawn with sufficient regard for the refugee definition. Moreover, when the Immigration Act requires the Minister to refer the transcript to the RSAC for consideration and advice it must contemplate that the transcript will be read by members of the RSAC. Recommendation: The screening of "manifestly unfounded" claims should cease. A panel of the RSAC should read and give direct consideration to each transcript.

A very high standard of fairness is appropriate for the refugee determination process.

Recommendation: The External Affairs reports on international human rights observance which are made available to the RSAC, should also be made available to the general public.

Recommendation: Independent material should not be weighed against the claimant unless it has been expressly brought to his attention either at the examination or at a re-examination and he has had the opportunity to respond to it.

A person whose credibility is being impeached should be put on notice and given the opportunity of explaining. Parallel observations may be made with respect to the application of the refugee definition. The present exclusive reliance upon the transcript process totally removes the "give and take" of oral argument and the oral presentation of evidence which our systems of adjudication have long considered to be important to the defining of issues and the opportunity of the parties to respond to them.

Recommendation: A refugee claimant should be entitled to a hearing in every case where the RSAC is not prepared to make a positive recommendation on the basis of the transcript. The claimant who is granted a hearing should be given notice of the substance of the objections to his claim. At the hearing, the transcript of the examination should be taken as having been "read in" to evidence.

D. Decision by the Minister

Although, in fact, the RSAC effectively decides the vast majority of refugee claims, in law it merely advises the Minister. It is the Minister who is authorized by the Immigration Act to make the determination of refugee status.

Recommendation: The reasons provided by the Minister for a negative determination should set out the relevant background information taken into account, the facts as found and the reasoning where applicable. They should deal with all of the substantial points raised by the claimant.

Recommendation: Field officers should be encouraged to refer cases to the Special Review Committee where it is apparent that they fall within the criteria, even though a refugee claim is likely to be made or already has been made.

E. The Right to Remain

A positive determination of refugee status does not confer a right to remain in Canada. If the refugee is not otherwise lawfully in Canada, a Minister's permit will normally be granted. A Minister's permit will not be given to a Convention refugee who is already protected by or returnable to a country other than the one where his life or freedom will be threatened. Moreover, the refugee must not fall within certain categories related to security or criminal conduct.

Recommendation: Before an adverse determination is made on the issue of "protection", both the refugee and the UNHCR representative should be put on notice that the right of the refugee to remain in Canada is in question. The refugee should be allowed to submit evidence and make representations on this issue prior to the initial determination.

F. In Status Claims

Recommendation: The Regulations should define in status claimants and specifically authorize an in status refugee claimant to be eligible for a work permit.

Recommendation: If in status claimants are to be advised of the rights available to them, they should be told not only that they will not be able to make an initial application for redetermination to the IAB, but also that they will be entitled to make a second out-of-status claim should they become the subject of an inquiry and that an application to the IAB would be available if the second claim is denied.

Recommendation: The Immigration Act should be amended to allow in status claims, as an alternative to out-of-status claims, with a right to apply for redetermination to the Immigration Appeal Board.

CHAPTER FOUR: REDETERMINATION AND REVIEW OF REFUGEE CLAIMS

A. The Immigration Appeal Board

Recommendation: The Regulations should be amended to extend the time for applying for redetermination to thirty days and to authorize the IAB to extend this time for just cause.

Recommendation: The Immigration Act should be amended to give the IAB the power to make rules governing the time limit for making an application for a redetermination.

If a full oral hearing is provided by the RSAC, the availability of a full hearing at the IAB level will become less crucial. Questions of fact and, particularly of credibility, could be resolved with greater confidence at the lower level so that the IAB determination would focus more on questions such as the scope of the refugee definition.

Recommendation: If the more comprehensive recommendations for statutory

changes presented in chapter six are not adopted, the Immigration Act should be amended at least to permit oral hearings by the IAB for all but frivolous applications.

Consequent upon the Minister adopting the standard of proof on a balance of probabilities but with any doubt being resolved in favour of the applicant, for the determination of refugee claims, it should be expected that the IAB would adopt the same standard for redeterminations.

Recommendation: The IAB should establish a specialized panel both to deal with applications for redetermination and to conduct redetermination hearings.

Recommendation: The Minister's counsel should present background country information at redetermination hearings, where such information is available to the Minister but does not otherwise appear to be available to the applicant or the Board.

Recommendation: The Immigration Appeal Board should adopt the practice of providing reasons together with every redetermination that an applicant is not a Convention refugee.

B. Further Review

The adequacy of the procedures for refugee determination and redetermination should not be diminished in importance because of the availability of judicial review. The procedures and practices in our refugee determination process must be addressed directly and without the illusion that we can rely upon the courts to redress any potential inadequacies.

CHAPTER FIVE: OVERSEAS PROCEDURES

A. Refugee Status Granted Abroad

The opportunity to make claims at home should not be used as a justification for refusing to grant visas which would allow a refugee claim to be made in Canada. In other words, granting claims in the home country should not result in the prohibition of claims in Canada or in a third country. Nor should the availability of at home claims necessarily weaken the credibility of claims which were made abroad rather than at home.

Recommendation: For those countries permitting direct refugee departure, Canadian visa officers should have the power to issue immigrant visas to refugees applying within their country of citizenship or habitual residence.

Recommendation: Adequate country background information should be made available to Canadian posts abroad for the purpose of assisting immigration officers abroad in determining refugee eligibility.

Recommendation: The Government of Canada should pursue with private sponsorship groups and the provinces, greater support for the admission of handicapped and unskilled refugees.

B. Special Humanitarian Programs

Although Canada does not have an overall temporary refugee policy, our temporary humanitarian programs provide not only temporary refuge but also a relaxation of the rules for landing. In the view of the Task Force, these programs represent an appropriate and flexible response to situations of crisis.

The special treatment accorded to persons falling within the self-exiled class appears to be based on the following principles: firstly, that

generally oppressive conditions exist in these countries; secondly, that exit controls exist and a person will be in difficulty with his government simply by leaving without permission or by staying outside of the country beyond the limited time; thirdly, that there are a significant number of co-nationals or former co-nationals in Canada who will facilitate resettlement.

Recommendation: Membership in the self-exiled class should be reviewed in light of the principles upon which this class has been established.

Recommendation: A member of the self-exiled class should be entitled to have an application for landing, which is made from within Canada, considered on the same grounds as an application made from a third country.

C. The Visa Requirement

Recommendation: A person should not be denied a visitor's visa solely on the basis that he intends to claim refugee status once he arrives in Canada.

Recommendation: The Government of Canada should impose a visa requirement on the citizens of any country generating a significant volume of frivolous refugee claims, where the government of the source country is not a gross and flagrant violator of human rights.

D. Family Reunion

Recommendation: A family member abroad of a refugee claimant in Canada should not be denied a visitor's visa solely on the basis that he would wish to remain in Canada should the claimant be given refugee status.

CHAPTER SIX: AN ENTIRELY NEW PROCESS

While the system of examination by senior immigration officers and the review of transcripts by the RSAC may have served adequately in a transitional phase, the Task Force is of the view that the time has now come to establish a full hearing process at the first level of refugee determination. The existing process embodies the highly desirable feature of centralization and, as a result, a high degree of uniformity in decision-making. The Task Force is of the view that such a feature should be continued under a new regime.

Recommendation: The Immigration Act should be amended to replace the present refugee determination process with a central tribunal which would hear and determine refugee claims. If such a full hearing process is established at the first level of refugee determination, the concept of a redetermination should be eliminated.

CHAPTER SEVEN: CONCLUSION

Our existing refugee determination process, with its fragmentation and reliance upon transcripts, is inherently slow. The delay in processing claims has been compounded by current backlogs in the system which have reached serious proportions. Delays in the ultimate disposition of refugee claims can create, not only hardship for the claimant and his family, but also difficulties for the system. The basic changes suggested in the previous chapter could substantially reduce such delays. However, the implementation of this basic change would require amendment of the Immigration Act.

Perhaps the most significant of the earlier recommendations is that a refugee claimant should be entitled to a hearing in every case where the RSAC is not prepared to make a positive recommendation on the basis of the transcript. Within the constraints of its present capacity and resources, it would simply be impossible for the RSAC to adopt this recommendation. However, with adequate personnel and resources, the backlog could be eliminated and the introduction of oral hearings need not lengthen the process significantly.

In the view of the Task Force, adequate personnel and resources should be allowed to the RSAC to permit it to eliminate its current backlog and to provide oral hearings as recommended.

CHAPTER ONE

INTRODUCTION

Fairness in any area of government administration is a moral duty, a political necessity and often a legal requirement. In the area of refugee claims procedure it is crucial, because the government may, in effect, be deciding on the life or death of a person.

Refugee claims decisions are inherently controversial. A claim granted may be considered by the government of the country from which the claimant seeks refuge as a criticism of that government. A claim denied may be considered by opponents of the government of the country from which the claimant seeks refuge as an indication of support for that government.

The serious consequences and high public profile of many refugee claims dictate that particular care be given to the selection of the procedures which are established for dealing with them.

The United Nations High Commissioner for Refugees (UNHCR) has recommended basic requirements for the determination of refugee status. However, these are in the form of general principles rather than specific procedures. The actual process is left for each country to establish on its own.

In Canada, the process which has been adopted for determining refugee status involves three separate stages:

(1) the examination of a claimant by a senior immigration officer;

(2) the review of the transcript of that examination by the Refugee Status Advisory Committee and the giving of advice by that body to the Minister;

(3) the decision by the Minister or his delegate with respect to refugee status.

Where the claim has been denied, there is provision for a "redetermination" by the Immigration Appeal Board. A completely different procedure is involved where the claim to enter Canada as a refugee is made from abroad.

It should be pointed out that a positive determination of refugee status does not necessarily ensure that the refugee will be permitted to remain in Canada. The Immigration Act may still operate to exclude certain Convention refugees on the basis of specified grounds related essentially to security or criminal conduct.[1]

A significant feature of our refugee determination process is that the claimant is not provided an opportunity to be heard orally by the decision-maker. (In this context, the Refugee Status Advisory Committee might be considered to be the effective decision-maker in most cases.) Another important feature is that all claims are determined centrally and administratively in the first instance. In contrast, a brief survey reveals that oral hearings are an integral part of the decision-making process in a number of Eurpean countries, whether the decisions are made administratively or judicially, centrally or locally.

In the Federal Republic of Germany, a refugee claimant has a right to two oral hearings, one at the administrative level and a second before a court, should he be rejected at the first level. Claimants formerly had the right of appeal to a third level but this has been abolished because of the lengthy delays which it created. The administrative refugee determination authority is centrally located. The refugee appeal courts are regionally located.

Italy has a single-level oral hearing system. There is no appeal. The Italian refugee determination authority hears claims only in Rome and at the refugee reception centre of Latina.

Switzerland has a two-level oral hearing system. The first level hearing is local. The second level hearing is central. If both oral hearings are negative, there are two further levels of appeal. The decision-making is administrative throughout.

In the Dutch system, a claimant is interviewed by a person who sends the report of the interview to a central government office. Claims will be accepted centrally without the claimant having been heard by those deciding. If the claim is not accepted on the basis of the interview report, the claimant is given an oral hearing before the central authority. A claimant rejected after a hearing can appeal to a court.

Austria has a regionally located, administrative, oral hearing procedure. There is an appeal to a central administrative authority, and, thereafter, in some cases to a court.

France grants a central, administrative, oral hearing to every refugee claimant at the first level. The refugee claimant has a right of appeal from a negative decision to a quasi-judicial tribunal.

Belgium has delegated its power to determine refugee status to the UNHCR representative in Belgium. The UNHCR representative will hold an oral hearing before a negative decision is made. There is no appeal from a negative decision.

In Sweden, the local authorities may grant refugee status after interviewing a claimant. Where refugee status is not granted by the local

authority, a central authority reviews the claim. The central authority does not interview the claimant.

In Norway, the local authority interviews the claimant and sends a transcript of the interview to a central authority. The central authority decides without hearing the claimant. There is provision for administrative review of negative decisions. The proceedings can also be brought into court by way of injunction. When that route is followed, there is an oral hearing.

No attempt is made to assess the relative merits of any of these various systems. Indeed, there are reports that some of these countries have experienced difficulties in relation to the application of their procedures in recent years. This brief survey is merely to illustrate that a wide range of approaches has been adopted by other countries and that oral hearings are often a significant feature.

In a submission to the Task Force by the Branch Office for Canada of the UNHCR, that organization was generally complimentary to the Canadian Government for its constant efforts to fulfill its international obligation to refugees. Nevertheless, serious reservations were expressed about the separation of the function of gathering information from the function of examining that information for the purpose of offering advice or reaching a decision. In any event, the general U.N. recommendations for the determination of refugee status are only meant to provide minimal requirements.

The fundamental position embodied in our present Act is that no rigid commitments are made beyond the minimum required to enable Canada to fulfil its legal obligations under the United Nations Convention. Any rights granted to refugees in the law are restricted to points mandated by the

Convention. Anything not specifically required by the Convention is left as a matter of privilege to be granted on a discretionary basis. As a direct consequence of this approach, the ultimate responsibility and authority for making determinations of refugee status were placed with the Minister.

At the same time, the Act recognizes that refugee determination is essentially an adjudicative process. A procedure is established for permitting the claimant to present his claim (the Examination). A procedure is also established for assessment of that claim and the giving of advice to the Minister (the Refugee Status Advisory Committee). The adjudication is then made (Decision by the Minister).

Shortly after the introduction of the current procedures, one observer described them in the following manner:

> Generally, the new Act and its refugee provisions are a step forward in the history of Canadian immigration legislation. For the first time, refugees have been dealt with as a specific topic of concern. Applicable principles and standards have been set out in statutory form, rather than being left to the uncertainty of international political relationships.[2]

There is no doubt that Canada has met its legal obligations in relation to the U.N. Convention. It has gone further. In attempting to meet the spirit as well as the strict letter of the Convention, many unsuccessful refugee claimants have been permitted to remain in Canada through the application of compassionate and humanitarian criteria.

However, the volume of refugee claims has increased significantly in recent years. As volume increases, there is a danger that fragmented and discretionary decision-making will lead to delay and inconsistency which, in turn, may create an impression of arbitrariness.

The Task Force is of the view that the best method of avoiding these dangers is to ensure that our refugee determination procedures reflect Canadian standards of procedural fairness as they have become manifest in our general legal concept of a "fair hearing". This does not require the transformation of the existing administrative process into one which is "judicial" or quasi-judicial" in nature. Indeed, since the adoption of the existing refugee determination process, our courts have been articulating a new concept of procedural fairness applicable to administrative decision-making. Nevertheless, the seriousness of the refugee determination decision suggests the appropriateness of adopting the high procedural standards which have been established for other areas of adjudication on matters of serious consequence.

The role of the Minister in the existing process offers sufficient flexibility to permit significant changes within the present legislative context. Over the longer term, amendments to the Act would be desirable.

In dealing with almost any aspect of immigration law and policy, it is important not to lose sight of the danger of abuse of procedures in order to achieve entry. That is also true in relation to refugees. However, the problem of abuse should be met, generally, on the plane of policy and regulation rather than in the adjudication of individual cases. An assumption of abuse in weighing the merits of specific cases would lead to a subversion of the spirit of our commitment to the U.N. Convention.

These general considerations permeate the observations and recommendations contained in this Report.

CHAPTER TWO

ESTABLISHING THE CLAIM

A. The Standard of Proof

The Handbook on Procedures and Criteria for Determining Refugee Status, published by the UNHCR, recognizes the general legal principle that the burden of proof lies on the person submitting a claim. However, that principle requires qualification in relation to refugee claims:

> Often an applicant may not be able to support his statements by documentary or other proof and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents.[3]

The Handbook states that, unless there is reason to doubt the credibility of a claimant, the "benefit of the doubt" should be given to him even in the absence of other supporting evidence.

This approach has been adopted by the Immigration Appeal Board:

> In other words, where there is doubt, the person claiming refugee status must be given the benefit of same....[4]

and the Federal Court:

> If an applicant swears to the truth of certain allegations, that, in my view, creates a presumption that those allegations are true unless there be reason to doubt their truthfulness.[5]

This concept has been stated as the general principle "in dubio pro reo", i.e., where there is, in the absence of conclusive evidence, reasonable doubt about the facts the claimaint alleges, he will be given the benefit of the doubt.

The Task Force has received representations which suggest that our present refugee determination process may place undue reliance upon the

presence or absence of corroborative evidence. This is also suggested by the rejection of a significant number of claims on the basis of credibility without the benefit of an interview with the claimant.

It may well be reasonable to assume that a substantial number of persons will be prepared to lie in order to gain entry into Canada. However, such a general assumption has no place in the assessment of individual claims if the principle of the "benefit of the doubt" is to be applied.

The Task Force understands that the general principle, in dubio pro reo or "the benefit of the doubt" is presently applied by the Refugee Status Advisory Committee and by the Minister. However, it does not appear to have been formally adopted or publicly articulated. The Task Force is of the view that the Minister should formally adopt this principle by way of an instruction to the Refugee Status Advisory Committee to apply it as a central guideline not only in relation to credibility but in relation to the application of the refugee definition to particular cases.

B. The Refugee Definition

1. The Convention and the Act

The Immigration Act adopts the definition of "Convention refugee" directly from the U.N. Convention to which Canada is a signatory. Section 2(1) of our Act provides:

> "Convention refugee" means any person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,
>
> > (a) is outside the country of his nationality and is unable or, by reason of such fear, is unwilling to avail himself of the protection of that country, or

> (b) not having a country of nationality, is outside the country of his former habitual residence and is unable or, by reason of such fear, is unwilling to return to that country.

While the Act does not incorporate the remainder of the Convention, it may still form part of our law. Moreover, as a matter of policy, we should respect its provisions.

There are opposing views as to whether the remainder of the Convention, which has not been specifically adopted by the Act, still forms part of our law. Decisions of the Federal Court of Appeal suggest that it does not.[6] On the other hand, Mr. Justice Pigeon, of the Supreme Court of Canada, has quoted with approval the following statement of Lord Diplock: "There is a presumption that the Crown did not intend to break an international treaty."[7] Mr. Justice Pigeon said that unless the Immigration Act explicitly required it, he had grave doubts whether the Immigration Appeal Board could properly disregard the provisions of the Convention. Presumably, the same consideration would apply to the Minister or the Refugee Status Advisory Committee. In any event, a commitment to the spirit of the Convention requires that a narrow and literal interpretation not be given to the definition in our Act.

One element of the Convention which is not contained in our Immigration Act is the proviso in relation to compelling reasons arising out of previous persecution. A person able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of his country of nationality is a refugee according to the Convention, even though the circumstances in connection with which he originally feared persecution have ceased to exist.

For example, a claimant who has come from a country that is now democratic with an independent judiciary may, nonetheless, remain a refugee if he was a refugee at a time when the regime of his country was undemocratic and if compelling reasons exist.[8] Compelling reasons would include an unwillingness to return to the scene of experienced atrocities, a distrust of the country arising from previous persecution, continuing discrimination from those no longer in government, views that continue to be highly unpopular with the new regime and psychological conditioning which has distanced the claimant from the country of origin.[9]

Thus, a person may not come within the statutory definition of a refugee, i.e., he may not have a well-founded fear of future prosecution. Yet he may come within the Convention definition of refugee, for example, he may have compelling reasons arising out of previous persecution, for refusing to avail himself of the country of his nationality. Such a person should be recognized by Canada as a refugee as a matter of policy, even though the principle stated by Mr. Justice Pigeon may not be binding as precedent in Canadian law.

The Task Force is of the view that in applying the definition of "Convention refugee" in the Immigration Act, the Minister should also give effect to the remainder of the Convention which has not been incorporated into the Act and which is not in direct contradiction to the Act.

2. Guidelines

While it is difficult to assess the consistency with which the refugee definition has been applied in Canada, at present there are no guidelines from the Minister to the Refugee Status Advisory Committee to

assist that body in providing advice to the Minister in individual cases. The Task Force believes that such guidelines would be of value. The principle of "the benefit of the doubt" and recognition of the Convention as discussed in the previous section are two items which could be included in such guidelines.

The Immigration Manual does provide some guidance to visa officers who must decide on refugee claims abroad[10] as well as to senior immigration officers interviewing claimants in Canada.[11] The UNHCR Handbook, referred to earlier, provides considerable discussion of each of the elements of the refugee definition.

In addition, case-law in other countries and in our own, has elaborated upon the bald statement of the refugee definition set out in the Convention. Academic authors have come to certain conclusions about the meaning of the refugee definition in areas of doubt. These elaborations and conclusions reflect what international law may require of us in applying the Convention definition.

The Task Force has drawn upon these sources and others in compiling the "Draft Guidelines" listed below. Without purporting to be comprehensive, these guidelines are recommended to the Minister for his consideration. It would be useful to make them available for scrutiny by the public as well as by those within government. Following whatever modifications the Minister deems appropriate, they should be transmitted to the Refugee Status Advisory Committee. They should also be kept under constant review and published in the Immigration Manual so that the public may have convenient access to them.

Draft Guidelines: Refugee Definition

1. When the application of the refugee definition to a claimant is in doubt, the claimant must receive the benefit of the doubt.

2. In addition to the definition provided in the Act, account shall also be taken of the remainder of the Convention which has not been incorporated into the Act. Thus, for example, a person who no longer has a well-founded fear of persecution will still be recognized as a refugee if, arising out of previous persecution, he has compelling reasons for refusing to avail himself of the country of his nationality.

3. A person is a refugee if he has a well-founded fear of future persecution based on one of the five criteria in the definition. Past persecution is evidence to substantiate a well-founded fear. However, it is not the only evidence. A person may not have been persecuted in the past, and yet still be a refugee.[12] Looking, as it does, to the future, the refugee definition is concerned with possibilities and probablities rather than with certainties.[13] A well-founded fear may be based on what has happened to others in similar circumstances.[14] Where a person has not been persecuted simply because he has not yet come to the attention of the authorities, he need not wait until he has been detected and persecuted before he can claim refugee status. Nor need he be under the threat of imminent persecution.[15]

4. Interference with personal freedom is not the only form of persecution within the refugee definition. Arbitrary interference with a person's privacy, family, home or correspondence may constitute persecution.[16] Deprivation of all means of earning a livelihood, denial of work commensurate with training and qualifications or pay low out of all reason may constitute persecution.[17] Relegation to substandard dwellings, exclusion from institutions of higher learning, enforced social and civil inactivity, denationalization, passport denial, constant surveillance and pressure to become an informer may all constitute persecution.[18]

5. Persecution may include behaviour tolerated by government in such a way as to leave the victim virtually unprotected by the agencies of the state. A person is a refugee if he has a well-founded fear of

persecution (as a result of one of the five factors in the definition) because he is not adequately protected by his government.[19]

6. Persecution may be periodic. It need not be continuous. A person arrested from time to time, interrogated and then released may be considered to be persecuted. Arrest need not be imminent at the time he leaves his country. He may even return to that country for a short period of time without being arrested. As long as the pattern of periodic arrest can be expected to continue, persecution will be established.[20]

7. Persecution may take the form of indiscriminate terror. Persons may be persecuted for no apparent cause at all, other than for the purpose of instilling fright in a population at large. Persons with a well-founded fear of becoming victims of governmental terrorist tactics are refugees.[21]

8. A person is a refugee whether he is persecuted alone, or persecuted with others. A person need not be singled out for persecution in order to be a refugee. Each claim must be assessed individually. Once that assessment takes place, a claim cannot be rejected simply because a large number of others could also legitimately fear the same persecution.[22]

9. Immigration considerations must not be brought to bear on the application of the refugee definition. The possibility that, if one person is given refugee status, many others might also be entitled to claim refugee status, is not relevant to whether the claimant is a refugee.

10. A person is a political refugee if he has a well-founded fear based on political opinion. He need not have a well-founded fear based on political activity. Political opinion means what is political in the opinion of the government from which the refugee flees, not what is political in the opinion of the refugee, or in the opinion of Canadian officials.[23] A person may have been totally inactive politically and have no political opinions of his own. Yet he may, nonetheless, be a political refugee.[24] The political prominence of the claimant is evidence of the likelihood of persecution but it is not a pre-requisite. A person who is disposed to clash politically with authorities from his country and who will probably or

possibly suffer persecution because of that disposition may be a refugee.[25]

11. A well-founded fear of persecution need not arise before the claimant has left his country. It may be based on what has happened in the country since the claimant has been abroad.[26] A person who was not a refugee at the time he left his country but who becomes a refugee after he leaves, is a "refugee sur place".[27]

12. A person may be a refugee even though he was able to leave his country without difficulty. He may have obtained a passport through official channels. He may not have been stopped by officials at the port of exit. As long as he has a well-founded fear of persecution should he have stayed, or should he return, he is a Convention refugee.

13. In determining whether there is a well founded fear of persecution, what is relevant, is the practice in the country the refugee flees. The legal structure in the country is not, in itself, conclusive.

Recommendation: The Minister should provide guidelines to the Refugee Status Advisory Commitee with respect to the application of the refugee definition. These should be kept under constant review and published in the Immigration Manual.

3. "Economic Refugees"

It has been suggested on a number of occasions that the definition of refugees should be expanded specifically to include "economic refugees".

The Task Force has had the opportunity to discuss this issue with the internationally recognized expert on refugees, Atle Grahl-Madsen. In his view, the phrase "economic refugee" is a misnomer and should be avoided.[28]

Persons sometimes described as "economic refugees" fall within the existing Convention definition. He suggested that if national authorities exclude these claimants from the Convention definition, then the definition is not being applied properly.

The guidelines advanced in the previous section clearly indicate that the well-founded fear of persecution may relate to economic factors. A person deprived by his home government of all means of earning a livelihood, allowed only work grossly incommensurate with his training and qualifications, or given pay for his work which is low and out of all reason, would fall within the definition of a Convention refugee. So would a person who leaves his country of citizenship for economic reasons and has a well-founded fear of persecution because of that departure.[29]

What must be remembered in applying the refugee definition to many of these situations is that the phrase "well-founded fear of persecution by reason of political opinion" does not mean only the political opinion of the refugee claimant. It also means what is imputed to be the political opinion of the claimant by the authorities of the country from which the claimant is fleeing.[30]

The Task Force adopts the views expressed by Grahl-Madsen and sees little value in attempting to include specific reference to economic circumstances in the refugee definition. Adoption of the Draft Guidelines proposed in the previous section should assist in ensuring that economic factors are not discounted, out of hand, in the determination of the existence of a "well-founded fear of persecution".

C. The Problem of Credibility

Reference has already been made to the difficulties which a refugee claimant may face in attempting to substantiate his personal testimony. It is, therefore, crucial that the claimant receive the benefit of the doubt in assessing his credibility.

This is particularly important where no opportunity is provided to explain what may be perceived by the assessor as misrepresentations, inconsistencies and concealments. Otherwise, there is the danger of falling into crystallized patterns of skepticism.

Since so many of these claims turn upon the question of credibility, the Task Force is of the view that it would also be valuable for the Minister to provide guidelines to the Refugee Status Advisory Committee for the assessment of credibility. Again, without purporting to be comprehensive, the Task Force proposes the Draft Guidelines below for the consideration of the Minister.

Draft Guidelines: Credibility Assessment

1. When the credibility of the claimant is in doubt, the claimant must receive the benefit of the doubt. An applicant who swears to certain allegations must be presumed to be telling the truth unless there be reason to doubt the truthfulness of those allegations.[31]

2. Inconsistency, misrepresentation, or concealment in a claim should not lead to a finding of incredibility where the inconsistency, misrepresentation or concealment is not material to the claim. If a statement is not believed but if the claim would be well-founded apart from that statement, then refugee status should be granted.

3. The fact that a claim was made only after the claimant received the advice of a lawyer is not relevant to the credibility of the claim. This is not a factor to be taken into account in determining credibility.

4. There are a number of factors which may be indicative of a lack of credibility. However, it is important to bear in mind that they may also be consistent with other rational conclusions. These factors must be assessed in each individual case and in the broader context of the special pressures which refugees frequently face:

   (a) A claim may be credible even though the claim was not made at the earliest possible opportunity. A genuine refugee may well wait until he is safely in the country before making a claim. He cannot, in every case, be expected to claim refugee status at the port of entry. A genuine refugee may not be aware, immediately, of his entitlement to refugee status. He may be in the country for some time before he becomes aware of our refugee claims procedure.

   (b) A claim may be credible even though, since leaving home, the claimant has been in another country besides Canada and has not claimed refugee status in that other country. The third country may have had a regime similar to the one which the claimant was fleeing. A genuine refugee may have felt it unnecessary to claim refugee status in a third country, because he was able to stay in the third country for the time he wished without claiming refugee status.

   (c) A claim may be credible even though the claimant has not approached the Canadian mission in his home country and claimed refugee status. Even for those countries (Chile, Argentina, and Uruguay) where it is possible to claim refugee status at home, a genuine refugee may fear that making such a claim at home would lead to detection and persecution.

   (d) Even where a statement is material, and is not believed, a person may, nonetheless, be a refugee. "Lies do not prove the converse."[32] Where a claimant is lying, and the lie is

material to his case, the Refugee Status Advisory Committee must, nonetheless, look at all of the evidence and arrive at a conclusion on the entire case. Indeed, an earlier lie which is openly admitted may, in some circumstances, be a factor to consider in support of credibility.[33]

(e) A claim may be credible even though the claimant submits information during a second examination (for example, on an out-of-status claim following an in-status claim) which was not submitted during the first examination. The claimant may have been reluctant to speak freely during the first examination but may be prepared to provide a full and accurate account on the second occasion.

(f) A person may be a credible claimant even though he has never been persecuted. The absence of actual detention or detection by the authorities or of wounds should not lead to the assumption of fabrication.

(g) A claim may be credible even though it is similar to other claims. A claimant should not be suspected of fabricating his claim simply because the pattern of his claim is similar to the pattern of other claims before the Refugee Status Advisory Committee.

(h) A claim may be credible even though it is different from other claims. A claimant should not be suspected of fabrication because his statements are different from statements made by other refugee claimants originating from the same country.

Recommendation: The Minister should provide guidelines to the Refugee Status Advisory Committee with respect to the assessment of credibility.

However, even with such guidelines, there is an inherent difficulty in attempting to assess credibility on the basis of a transcript and without having an opportunity to assess the claimant or to provide him with the opportunity to explain apparent misrepresentations, inconsistencies or concealments. We return to this problem under the heading of the Refugee Status Advisory Committee in the next chapter.

CHAPTER THREE

INLAND PROCEDURE

A. Introduction

1. General

As indicated earlier, the process established by the Immigration Act for the determination of refugee status involves three distinct stages:

(1) the EXAMINATION of the claimant by a senior immigration officer;

(2) the review of the transcript of that examination by the REFUGEE STATUS ADVISORY COMMITTEE and the giving of advice by that body to the Minister;

(3) the actual DECISION BY THE MINISTER or his delegate with respect to refugee status.

Each of these stages is discussed under Parts B, C and D respectively. In Part E consideration is given to the special situation of refugee claimants who are already lawfully in Canada.

Under the sub-headings which follow, attention is given to problems which may arise after the potential claimant has arrived in Canada but prior to the commencement of the Examination.

2. Access to Counsel

The Immigration Act specifically provides that the claimant has a right to counsel during the Examination and requires that he be so informed. However, there may also be a need for legal advice during the initial

interview by the port of entry interviewing officer, as soon as an intention to claim refugee status has been indicated.

Allegations of intimidation have been made, including hostile interrogation and threats of immediate deportation. Information with respect to the refugee process may be withheld. Such an approach may be particularly harsh for someone who is fleeing official persecution.

It should be noted that anything said at the initial interview is accessible to the Refugee Status Advisory Committee, and may be used in evaluating the claim. The Refugee Status Advisory Committee does not restrict itself solely to the examination under oath in forming an opinion. Although the notes of the port of entry interviewing officer would not normally be part of the record before the Immigration Appeal Board, a senior immigration officer conducting a refugee examination could legitimately ask a refugee claimant what he had said to an interviewing officer at a port of entry. If such a question were asked, the substance of the initial interview could be incorporated into the transcript and form part of the record subsequently before the Board.

It has been proposed that a claimant's right to counsel should be advanced to the point at which he expresses his intention to ask for refugee status and that he should be so informed. Indeed, in March of 1979, the Minister of Immigration expressed the following position:

> I will instruct my officers in the field that wherever it becomes apparent that a person wishes to establish a refugee claim, he will be fully informed of his rights and pending proceedings stopped, so that the person may obtain the aid of counsel or a voluntary group.

However, this approach is not being taken at the present time.[34] While the proposal may cause some inconvenience in processing at the port of entry it

might also avoid problems at the later stages of the refugee determination process. In any event, a high price is paid if efficiency must depend upon the subject's ignorance of his legal rights.

Recommendation: A potential refugee claimant should have a right to counsel immediately upon indication of his intention to ask for refugee status and should be informed of this right.

3. Information for Claimants

Employment and Immigration Canada has prepared a pamphlet entitled "Claiming Refugee Status in Canada, Information for Claimants". The pamphlet outlines procedures used by Canadian immigration authorities in determining whether a person may be granted refugee status in Canada and refers claimants to the UNHCR office in Ottawa for further information. It also lists some voluntary national organizations which offer assistance to refugee claimants and indicates that a list of regional and local volunteer organizations assisting refugee claimants is available at the nearest Canada immigration centre.

The initiative in preparing the pamphlet is commendable. However, the policy is to restrict its distribution for handout to those who are potential refugees or their representatives and not to display it on racks or counters with the Commission's other publications.

The problem is that potential refugee claimants may be unaware that they are entitled to claim refugee status and, in some instances, this is even the case for some time after they have entered. Applicants or would-be applicants are often nervous, inarticulate and/or incapable of speaking either

official language. Moreover, a person may not be perceived by the Immigration Officer as a potential refugee unless a claim actually has been made. Even claimants may not receive the pamphlet unless it is specifically requested by them.

However, to restrict distribution to obviously potential refugees or to those claimants who ask, will often restrict access to those claimants who already have some knowledge of the process. This information should be made more generally available.

Recommendation: The pamphlet on refugee claims procedure should be made available for general distribution through display at ports of entry and at immigration centres together with other immigration literature.

4. Venue of Claims

The Act contemplates that an "inquiry" will be commenced prior to the claim being made for refugee status. Inquiries are often held at the port of entry.

It has been proposed that refugee proceedings should be held in the immigration centre nearest the person's intended destination. Otherwise relatives and friends of the claimant may be caused needless financial hardship. They may have to travel to the port of entry from points across Canada for the examination under oath and to sign a bond. The claimant, himself, may be denied friends, advice and living support which he would have at his intended destination.

In such circumstances, a claimant might be tempted to enter as a visitor in order to arrive at his intended destination before making his claim.

However, the entry as a visitor may detract from the credibility of his subsequent refugee claim.

The Immigration Manual makes specific provision for the change of venue of an inquiry. Instances are listed where the granting of a request for a change of venue of an inquiry would be appropriate. Examples are where the person concerned is a minor and the adjudicator wishes to appoint as guardian, a relative located at the minor's destination,[35] or where the person concerned is travelling with a Canadian and the Canadian is to be present at the inquiry.[36]

The Manual does not make specific reference to refugee claimants in the context of change of venue applications. Nevertheless, there is a distinction between refugee claimants and others who are the subject of an inquiry.

There is justification for normally dealing with the non-refugee claimant at the port of entry. Since the inquiry is the only proceeding which he faces, he will be required to leave the country immediately if he is unsuccessful. Should there be a change of venue, Canada might be faced with additional costs of removal.[37]

However, the more extended procedure for determining refugee claims ensures that the claimant will arrive at his intended destination before a decision is made in his case. The claimant is entitled to remain in Canada during the weeks and months from the time of the examination to the ultimate decision by the Minister and a possible redetermination by the Immigration Appeal Board.

Since the claimant is likely to be at his intended destination at the time his status is determined in any event, there appears to be no sound

reason not to permit a change of venue at the outset. Moreover, if a change of venue is to be permitted in relation to the refugee claim (the examination) it makes eminent sense to conduct the inquiry at the intended destination as well, rather than to have one proceeding at the port of entry and the other at the intended destination.

Any refugee claimant who wishes a change of venue of the inquiry and the examination should pay for the inland transportation to his intended destination. Of course, a change of venue should be permitted only where translation, court stenographers and other necessary facilities are available at the centre nearest the intended destination.

Although it appears to be the policy of the Immigration Commission to permit refugee proceedings to be held in the immigration centre nearest the intended destination, the Task Force has received representations that requests for transfers were being dealt with inconsistently by officers at ports of entry. Moreover, even where transfer of the examination under oath of a refugee claimant is permitted, transfer of the related inquiry does not necessarily occur.

Recommendation: The Immigration Manual should provide that both refugee examinations and the inquiries of would-be refugee claimants should be held, on the request of the claimant, at the immigration centre nearest the intended destination provided that the claimant pay for inland transportation and subject to the availability of necessary facilities.

B. The Examination

1. Introduction

Where the subject of an inquiry claims to be a Convention refugee, the Act provides for the adjournment of the inquiry and the examination of the claimant under oath by a senior immigration officer. The transcript of the examination is later sent to Ottawa for assessment by the Refugee Status Advisory Committee (RSAC). The Minister then receives the advice of the Refugee Status Advisory Committee and makes a determination of refugee status. The Immigration Appeal Board may be asked to make a "redetermination".

The transcript of the examination forms the central evidentiary basis for all subsequent decision-making. Except in a small percentage of cases which make their way to an Immigration Appeal Board hearing (where an application for redetermination is allowed to proceed), the claimant has no opportunity to present himself, personally, for assessment by those who will decide his fate. Nor may the claimant or his counsel, ordinarily, present oral argument before those who decide.

The major difficulty created by reliance upon the transcript, to the exclusion of oral testimony before the decision-maker, is in relation to the assessment of credibility. The RSAC is left in the position of having to determine credibility on the basis of apparent omissions or inconsistencies which cannot easily be pursued for clarification. There is no opportunity to assess the sincerity of the claimant through the subtle techniques which are generally summarized as the "demeanor" of the witness.

2. Translation

In this context, correct translation becomes of overwhelming importance. Where there is an oral hearing, poor translation may be an inconvenience. Nevertheless, questions can be asked to clarify what is not clear in the minds of those deciding. The claimant may correct any wrong impressions arising from poor translation. However, where there is no hearing, poor translation may create an almost insuperable obstacle to the clear presentation of a claim.

The Immigration Commission takes the position that financial resources do not permit the employment of professional translators for refugee claims. While competent, non-professional translators may often be available, the relatively low pay schedule which has been established by the Commission has created a chronic problem in securing them in some regions.

Persons may be selected as translators, who have neither French nor English as a first language. Their lack of coherence in expressing what the claimant has said may require the decision-maker to engage almost in guesswork. The difficulty, of course, is that a wrong guess may lead to disastrous results for the claimant.

The availability of better translation does not meet the central problem of the unavailability of an oral hearing. Nevertheless, as long as the transcripts are to form a significant feature of the refugee determination process, high quality translation is crucial. The problem of financial resources is addressed in the last chapter of this Report.

Recommendation: The pay schedule for translators should be reviewed to permit the retention of professional translators or, at least, competent

translators who have French or English as a first language.

3. Country Information

Commission guidelines for the examination under oath of refugee claimants, state that the claimant should not provide general background information about the country of the claimant. General information about oppressive conditions is to be avoided. The Commission's "model examination" also instructs the senior immigration officer to advise the claimant that the RSAC has access to country information reports and is fully informed of events in refugee source countries.[38]

At the same time, the "model examination" does instruct the senior immigration officer to ask specific questions concerning the date of government changes, the names of party leaders and the platforms or objectives of parties.[39] The purpose of these questions is not to obtain information about the country but as a check on the claimant's credibility.

There are two problems created by this approach. First of all, there may be cases where the claimant is in a position to present relevant evidence which would not otherwise come to the attention of the RSAC members assessing his claim or which is superior to the evidence available to the RSAC. Yet he may be discouraged from presenting such evidence. Secondly, even if it could be assumed that the RSAC is fully informed on events in refugee source countries, the same assumption cannot be made with respect to the Immigration Appeal Board (IAB), which has no internal system for providing country information. The transcript of the examination may be the only source of country information available to the IAB on an application for redetermination. The claimant should have a full opportunity to present

his entire claim during the examination including country background information.

At present, the general practice of the Immigration Commission is not to provide background information about the country of the claimant to the senior immigration officer who is conducting the inquiry. The availability of such information would serve a general purpose, even under the guidelines referred to earlier. However, if claimants are no longer to be discouraged from presenting testimony about the country in question, it will be still more important that the officer conducting the examination be adequately briefed wherever possible. This would permit relevant questions to be asked and would avoid irrelevant ones. In any event, in every case where a claimant makes an ambiguous reference to a political event, institution or individual, the senior immigration officer should ask him to explain.

Recommendation: The claimant should not be discouraged from submitting country background information during the examination. The Commission should provide relevant country background information to the senior immigration officer conducting an examination.

4. Conduct of the Examination

The Guidelines for the conduct of examinations provide that the questioning should begin by the senior immigration officer collecting "basic data". Subsequently, two options are available with the choice at the discretion of the senior officer.[40] The sequence for each of these options is as follows:

Option One
- The claimant assisted by counsel gives a brief and concise statement on the reason(s) for fear of persecution....
- The Senior Immigration Officer then follows up with questions to establish the facts of the claim.
- Counsel will be given an opportunity to ask further questions to clarify or elaborate on the statement made by the claimant.

Option Two
- The claimant makes a statement on his claim and counsel commences questioning to further develop this claim.
- During this process the Senior Immigration Officer should participate in the questioning to draw out clarifying facts of the claim.

There are a number of problems associated with the current Guidelines for conducting examinations.

(a) Basic Data

The "model examination" elaborates upon the preliminary step of gathering basic data by illustrating the kinds of questions which should be asked at the outset. These include questions as to the following:

. the reason for the trip and whether it was the intention of the claimant to return;[41]

. whether the claimant had applied for or inquired about obtaining an immigrant visa for Canada (in order to assist in providing indications of the claimants motivations to come to Canada);[42]

. whether the claimant has made a previous claim to refugee status in another country.[43]

The answers to all of these questions go beyond introductory or biographical data and are relevant to the person's claim to refugee status.

Specific questions along these lines suggest a cross-examination stance contrary to the general admonition in the Guidelines to the

contrary.[44] Even though questioning may be necessary to bring forward all relevant facts, such questioning is inappropriate at this stage. The claimant should first be given the full opportunity to tell his story. This is particularly the case where counsel is present. Provided, of course, that counsel is well-prepared, the relevant facts may be presented comprehensively yet expeditiously when counsel questions the claimant first.

The Task Force is of the view that it is inappropriate for questioning on the examination to commence with the senior immigration officer seeking "basic data". The comments which follow, with respect to the sequence of questioning, suggest that ample opportunity will be available later, for questioning by way of clarification or to pursue any other relevant line of questioning which has not been exhausted.

(b) Sequence of Questioning

Option Two of the Guidelines, then, is preferable to Option One. Counsel should question the claimant before the senior immigration officer does. The latter may always ask questions for the purpose of clarification but the line of questioning by counsel should not be broken.

However, Option Two is inadequate as it presently reads since it does not provide for the senior immigration officer to embark upon other relevant lines of questioning after counsel's questioning has been concluded. (Counsel should also be permitted questions by way of clarification with respect to new lines of questioning.)

It would be preferable to eliminate the present options and establish one format for questioning along the lines indicated above. The Guidelines might read as follows:

- The claimant outlines his claim, either in narrative form or in response to questions by counsel.
- During this process, the Senior Immigration Officer should participate in the questioning to draw out clarifying facts but should otherwise permit counsel to pursue his line of questioning without interruption.
- After the claimant has had a full opportunity to present his claim, the Senior Immigration Officer should pursue any other relevant line of questioning including questions to ensure that all "basic data" have been established.
- During this process, counsel may participate in the questioning to draw out clarifying facts.

Of course, questioning by counsel is subject to the restriction that counsel not be permitted to dominate the examination through coaching or leading the witness. The present Guidelines adequately deal with this aspect.

(c) Brevity

The "model examination" instructs that the claimant should be asked to be brief in making his initial statement.[45]

However, the UNHCR Handbook referred to in chapter two, points out that a refugee claimant in fear of authorities in his own country may feel apprehensive of any authority. He may be afraid to speak freely or to give a full and accurate account of his case.[46] The Handbook suggests that an examiner should assist the claimant in fully explaining his opinions and feelings. Asking the claimant to be brief may have exactly the opposite effect. Instead of encouraging him to give a full and accurate account, it may reinforce his inclination to give an adumbrated and elliptical account.

No doubt, the senior immigration officer conducting an examination may occasionally, or even frequently, have to remind the claimant of the purpose of the hearing, particularly when counsel is not

present. However, patience and sensitivity rather than brevity should be the guiding factors. The claimant should be encouraged to make a full and complete presentation of his claim.

(d) Confidentiality

In this context, it will often be of great importance to the claimant that his testimony be treated in a confidential manner. He may be fearful for the safety of relatives or friends. The UNHCR Handbook states that it is of the utmost importance that the applicant's statements be treated as confidential and that he be so informed.[47]

The examination of a refugee claimant is not open to the public. The transcripts are confidential, to the knowledge of the Task Force, and are not made available by the Government of Canada to foreign countries.

It is true that, if the claimant applies to the Immigration Appeal Board or the Federal Court of Canada, the hearings are public and the transcript would form part of a public record. However, the claimant may take this into account in deciding whether or not to apply for a redetermination by the IAB.

The Guidelines state that it "may also be prudent to emphasize" that the RSAC will respect the confidentiality of the claim.[48] However, the "model examination" makes no reference to confidentiality. At the outset of each examination, the claimant should be informed that his statements will be treated as confidential by government officials and by the Minister.

Recommendation: The current options for conducting examinations should be eliminated in favour of a format whereby the claimant is permitted to

present his entire claim prior to questioning, apart from questions of clarification, by the senior immigration officer. The claimant should be encouraged to make a full and complete presentation of his case and should be informed, specifically, that his statements will be treated as confidential unless he decides to apply for a redetermination.

5. Recommendations by the Senior Immigration Officer (SIO)

The SIO examining the claimant makes no recommendations to the RSAC on the claim or the credibility of the claimant. The Guidelines provide that: "The SIO must refrain from making judgment on the claim."[49] The model examination has the SIO telling the claimant: "I will make no comments whatsoever on the merits of your claim."[50]

This was not always the case. At one time, the SIO did make recommendations on claims but the claimants were not informed of those recommendations. The officer would simply add a note to the transcript commenting on the claim or the credibility of the claimant. This practice ended with objections from outside volunteer organizations who claimed that the SIO's were not capable of making the judgments which they were making.

There are two views which can be taken of the making of such recommendations by the SIO. The first is that he has not received proper training to make such recommendations. In any case, since it is the RSAC which must advise the Minister, an SIO recommendation would be prejudgmental of the case. The RSAC should approach the transcript without the influence of a recommendation from someone else.

The other view is that these disadvantages are out-weighed by having an assessment of credibility by one who actually sees and examines the claimant. The members of the RSAC are placed in a very difficult

the claimant. The members of the RSAC are placed in a very difficult position in having to determine whether a person is lying or telling the truth simply by reading transcripts and without the opportunity to pose questions or judge demeanour.

In 1979, the Minister of Immigration indicated that he was considering the possibility of having refugee examinations conducted by adjudicators or by a specialized group of officers in the larger immigration centres, trained specially for this function. This change was contemplated, not with the possibility in mind that SIOs or adjudicators would make recommendations, but simply so that the examinations themselves would be better conducted.

Ideally, the person who makes the decision should also assess demeanour. Nevertheless, should the existing situation prevail, of exclusive reliance upon the transcript, further consideration should be given to having the examinations conducted by adjudicators and having them comment upon the credibility of the claimant. It is part of the existing training and experience of adjudicators to assess credibility. As an alternative, examinations should be conducted by specially trained SIOs, who would make recommendations on credibility. The entire recommendation should be made available to the claimant at the time the transcript is transmitted to him for possible written comment to the RSAC.

Recommendation: If the present system of examinations is to continue, they should be conducted by adjudicators or, as an alternative, by senior immigration officers who are specially trained for this purpose. In such circumstances, the person conducting the examination should make a

recommendation as to the credibility of the claimant which should be made fully available to him for possible written comment to the RSAC.

C. The Refugee Status Advisory Committee

1. Introduction

Frequent reference has already been made in this Report to the difficulties which the RSAC must face in attempting to assess the credibility of claimants without hearing them personally. It has been suggested that to deny a hearing before the body which makes the decision may not be in accord with the concept of fairness.

Such observations and those which follow should not, in any way, be taken as a criticism of the manner in which present or past members of the RSAC have approached their duties. The Task Force has no reason to believe that those members have acted other than with diligence, industry and a sense of fairness in fulfilling their function.

The problem which the Task Force sees in relation to this body is institutional. First of all, the Act, itself, suggests an assessment on the basis of the transcript and does not make reference to oral hearings by the RSAC. Secondly, the RSAC has not received the stature and related resources to deal appropriately with the important function which has been assigned to it.

The members of the Refugee Status Advisory Committee appear to be doing the best they can to provide a fair assessment of individual claims in the face of an awkward procedure and a crushing caseload in relation to the resources available. However, at present, too much is being asked of them.

2. Composition

At this time, the Refugee Status Advisory Committee is composed of a full-time Chairman, four non-governmental members who serve on a per diem basis and respresentatives from the Immigration Commission and the Department of External Affairs, respectively. These government officials also serve on a part-time basis and have regular duties within their own departments. The complement of support staff is approximately ten. This secretariat provides secretarial and administrative services and includes officers who do research and present cases to the panels.

The RSAC normally sits in panels of four, although three is considered to be a quorum. A typical panel will consist of two members from the private sector, one person from External Affairs and one from Immigration with the latter sitting as chairman of the panel. A representative of the UNHCR also participates as an observer and adviser. In the case of a tie, the chairman has an extra, deciding vote. Thus, where there are two panel members in favour of granting refugee status and two opposed, the claim will be denied if the chairman is in opposition. Within the spirit of the "benefit of the doubt", discussed in chapter two, it would be preferable that all tie votes be resolved in favour of the claimant.

The Chairman of the RSAC does not sit on the panels which examine claims. Rather, he reviews the advice of the panels which he may send back for reconsideration.

No doubt, representation from the Immigration Commission brings an element of expertise to the RSAC. However, it also carries with it a problem. The UNHCR submission to this Task Force contains the following observation:

> We are thinking here of the possibility that factors related more to typical immigration questions than to claims for refugee status may play a part in the decision reached. We have from time to time had to remind the RSAC that questions such as whether the applicant will be able to successfully settle in Canada and whether a positive decision in a certain case will "open the floodgates" to other similar cases, are not proper considerations.[51]

The submission goes on to say that assurances have been received that such considerations do not form the basis of specific negative recommendations and expresses the belief that most immigration officers involved "do try their best to separate their usual concerns from those relevant to a refugee status claims". Nevertheless, their participation raises difficulties, at least in perception, if not in fact.

The same might be said of the participation of officials from External Affairs. They might be perceived as bringing to bear upon decisions, the effect which a finding of persecution might have upon Canada's relations with the country which the claimant is fleeing. The Task Force is quick to add that it has heard absolutely nothing to suggest that refugee determination has been affected by diplomatic considerations. However, the issue here is the manner in which decision-making affecting the rights of individuals may be perceived. That has long been a significant aspect of our concept of fairness.

Of course, there is no objection to a former member of the Immigration Commission or the External Affairs Department being appointed to the RSAC. However, members should sever their ties with other departments or be sought outside of the public service. The Act provides merely that the Minister shall appoint "such persons as he considers appropriate."[52] Since those deciding refugee claims must develop "an

understanding of the applicant's particular difficulties and needs", this factor, obviously, should be considered in assessing candidates for appointment.

The part-time status of members raises another problem if the member is also engaged in full-time duties elsewhere. The study of claims may have to be relegated to "evening reading" with inevitable time pressures and little opportunity to consult the secretariat files in order to become more familiar with country information. There is now a heavy backlog at the RSAC level. There have been approximately fifteen hundred claims filed in each of the last two years. It has been possible to process only about one thousand claims in each of these years.

The UNHCR has submitted that the participants in the refugee determination process should serve on a full-time basis. On the other hand, part-time members and some turnover of membership may bring the perspectives of different backgrounds to bear upon the assessment of claims.

The Task Force is of the view that whether the members serve on a full-time or part-time basis is not the central issue. What is important is: that the members be impartial and be perceived as such by the public; that they have the background and ability to develop an understanding and sensitivity in relation to the circumstances of refugees; and, that they be adequate in terms of number and availability to cope with the existing caseload in a reflective and judicial manner.

Recommendation: Additional full-time and part-time members should be appointed to the RSAC, sufficient in numbers to cope adequately with the existing workload and taking into account changes which might be implemented as a result of this Report. Members should sever their ties with

other departments or be drawn from outside the public service. When the RSAC sits in evenly numbered panels, a tie vote should be resolved in favour of the claimant.

3. Manifestly Unfounded Claims

In order to avoid being buried by the sheer volume of claims, the RSAC has adopted a process of screening. This involves an administrative officer reading all of the transcripts in the first instance. If the administrative officer decides that a claim is manifestly unfounded, the transcript is not circulated to the RSAC. All that is circulated is a summary of the claim. The RSAC may still request that the transcript be circulated after having read the summary and the decision of the administrative officer may be reversed by the RSAC. As a result of this process, about one-half of the transcripts are not actually examined by the RSAC.

The backlog of cases and resultant delay in processing have also led to categories of priority processing. For example, those refugee claimants who are denied work permits must have their claims marked "urgent" by the SIO when they are submitted to the RSAC.[53] Similarly, priority processing is given to claims of claimants under detention and to manifestly unfounded claims. If the current delay in processing is to continue, priority should also be given to claimants who are separated from their families.

However, a system of priority processing is only a reaction to the symptoms of the problem and creates problems of its own. By giving priority to manifestly unfounded claims, the RSAC panels may end up spending more

time on summaries of these claims while consideration of the transcripts of possibly well-founded claims is further delayed.

Guidelines have been established indicating when claims should be considered to be "manifestly unfounded". However, careful analysis of these guidelines leads to the conclusion that they may not have been drawn with sufficient regard for the refugee definition, which was discussed in chapter two. As a result, the application of these guidelines could well lead to the screening out of well-founded claims.

For example, the guidelines propose that a claim should be screened out if the claim originated in a freely elected parliamentary style democracy where fundamental rights and freedoms are enshrined in legislation and safeguarded on a non-discriminatory basis by an independent judiciary. However, this fails to take into account the proviso to the U.N. Convention[54] which, as suggested earlier, should be considered as part of the refugee definition in Canada.

The guidelines also provide that a claim is to be screened out if the claimant admits that he has not been involved in any activity against the regime of the country of his nationality or has not been persecuted. However, this fails to take into account that the definition refers to political "opinion" rather than political activity. Nor is actual persecution required to establish a claim. There need only be a well-founded "fear" of persecution.

The Task Force understands that claims are also screened out on the basis of credibility. The difficulties facing the RSAC members in having to assess credibility on the basis of the transcript alone, have already been discussed. They are compounded when the member does not even read the transcript but relies on a summary of the transcript made by another.

This observation leads to a more basic objection to the screening system. It is that when the Immigration Act requires the Minister to refer the transcript to the RSAC for consideration and advice[55] it must contemplate that the transcript will be read by members of the RSAC. A function of this nature is not appropriate for what is, in effect, delegation.

The RSAC should not be left in the position of having to choose between procedures of expedience and collapse of the entire system. It should be given sufficient resources for the members, themselves, directly to perform the important function assigned to it. If the officers who presently screen claims are particularly adept at reading and assessing transcripts, perhaps they should be considered for appointment as full-time members.

Recommendation: The screening of "manifestly unfounded" claims should cease. A panel of the RSAC should read and give direct consideration to each transcript.

4. A Fair Hearing

(a) General

The duty of fairness, in accordance with general Administrative Law principles, essentially involves providing a person with a full opportunity to comment upon or contradict what is said against him. The UNHCR Handbook sets out, as a basic requirement, that a refugee claimant be given an opportunity "to clarify any apparent inconsistencies", "to resolve any contradictions" and to offer "an explantion for any misrepresentation or concealment of material facts".[56] The duty of fairness does not require that the claimant have put to him all of the detail of the case against him. It is

sufficient if he is given the substance or broad grounds. Thus, the government need not ordinarily name its informants.

In Canada, the Minister is not bound in law to comply with these general Administrative Law principles in determining refugee claims. The Federal Court of Appeal has said that the Minister may, when making a refugee determination, "consider and base his decision on any evidence or material obtained from any source, without having to give a chance to the claimant to respond to that evidence".[57]

However, the central issue here is not one of legal obligation but of appropriate response. The law establishes only minimum standards of conduct. With only the bare elements in the Act to guide him, the Minister, alone, must establish the standard of fairness which he considers appropriate for refugee determination.

Perhaps the most detailed protections for the fairness of hearings are to be found in our criminal process. That is not because of the stature of those who tend to come into conflict with the criminal law. It is certainly not because the majority of those who are charged are innocent. In fact, the vast majority plead guilty. It is seen to be crucial that the criminal trial be fair because of the seriousness of the consequences of a mistake.

If that criterion is applied to the refugee determination process then a very high standard, indeed, is warranted. The death penalty is no longer a consequence of the criminal process in Canada. However, it may be a consequence of an erroneous refugee determination.

(b) Country Information

The country information which the RSAC accumulates in the files which are maintained by its secretariat, includes newspaper reports, Amnesty International reports and other reports of a public nature. Where an individual claimant submits significant information, which was not previously available to the secretariat, the information will be extracted from the claim and placed on file. Information received from the Department of External Affairs is also included. This may flow from the daily political reporting of our embassies abroad to the Canadian government at home. In addition, the RSAC may address specific requests to External Affairs about the political situation in a particular country.

The U.S. Department of State is under a statutory obligation to publish an annual report with respect to the observance of internationally recognized human rights in each country receiving American foreign or military aid. The 1979 report covers 115 countries. While there is no such statutory obligation in Canada and the expense of publishing a formal volume may not be justified, Canada should make publicly available the information which it accumulates with respect to the observance of internationally recognized rights. The "delivery system" which is selected will require some careful thought. However, the "passive" availability of files for public scrutiny may suffice.

Such information is not, by its nature, confidential. It involves public events which are often reported elsewhere. Making Canadian information on human rights observance generally available will not disclose information which was previously secret. It will merely gather previously dispersed information for those who are interested.

It is Canadian policy publicly to deplore or condemn the practices of human rights offenders only if confidential contacts with the government concerned fail to have a positive impact.[58] The Secretary of State for External Affairs for Canada has stated that the Government of Canada avoids confrontational tactics and condemnation. They are unproductive. However, fact-finding is distinct from condemnation. It is perfectly consistent with current Canadian policy to release reports on human rights observance in foreign countries. Nor should mere publication jeopardize Canada's policy of confidential contacts abroad.

The quality and value to the RSAC of current External Affairs human rights reporting may be questionable. However, unless these reports are made available to the public and made subject to public scrutiny, it will be virtually impossible to assess whether they are adequate, whether they are correct, whether they are complete and whether they need to be improved.

Recommendation: The External Affairs reports on international human rights observance which are made available to the RSAC, should also be made available to the general public.

(c) Independent Material

The RSAC does not restrict itself to examining the transcript of the claim submitted. It may look at material gathered independently and it may, itself, gather material (through its secretariat).

If a claimant, in his transcript, mentions having approached a Canadian embassy abroad, the RSAC secretariat may contact that embassy to determine the accuracy of the claimant's account. If the claimant

mentions having contacted a volunteer agency abroad, the secretariat may have the Canadian embassy abroad contact that agency for confirmation. If a claimant refers to a gross and flagrant violation of human rights not previously chronicled in the RSAC files, the secretariat may contact the Canadian embassy abroad for information about the event which the claimant relates.

If a claimant refers to someone who has made an earlier independent claim for refugee status, or to an event which another claimant has mentioned in his claim, or to a governmental practice that another claimant has mentioned in his claim, the claim is also cross-referenced with the earlier independent claim for verification. The "model examination" informs the SIO that dates and places of arrest and detention or imprisonment are of particular interest as these may or may not conflict with statements made by others in previous examinations.[59]

The material independently gathered by the secretariat is not circulated, initially, to the RSAC panel examining the claim. However, where it does contradict or confirm the claim, usually it will be given only to the chairman of the panel examining the claim. When the panel meets to consider the claim, the panel members indicate how they would dispose of the claim before the chairman informs them of the independently gathered material.

The panel members may then decide that the information is such that it would change their advice to the Minister on the claim. If so, the examination may be reconvened to allow the claimant to react to this independently gathered information. Examinations are not reconvened where the relevant information is a cross-referenced claim, or an External Affairs

political report. In these situations, the claimant does not have an opportunity to react to the information. Even where the information is a contradictory report of the claimant's contact with an embassy abroad or a non-governmental organization abroad, the examination is not always reconvened to present this information to the claimant and allow him to react to it.

When an examination is reconvened, it is the policy of the RSAC to give notice in advance to the claimant of the purpose of the examination. However, the Task Force has received suggestions that this policy may have broken down in its application with the result that, on occasion, neither the claimant nor his counsel were aware of the purpose of the re-examination before it convened.

It was suggested in the Introduction to this section that basic fairness required that the subject be aware of allegations and evidence which are to be weighed against him and that he have the opportunity to contradict them. Sufficient notice should also be provided where necessary to permit an adequate response. There should be no preliminary determination whether the adverse information is decisive before communicating it to the claimant. It should be communicated wherever it is relevant and adverse.

Recommendation: Independent material should not be weighed against the claimant unless it has been expressly brought to his attention either at the examination or at a re-examination and he has had the opportunity to respond to it.

(d) A Fair Hearing

This opportunity to respond is also relevant to the assessment of information which the claimant presents and, indeed, to the assessment of the claimant himself. However, the implications are more subtle.

Where an applicant has a full opportunity to present his case, without restraint or challenge, and the tribunal subsequently renders a decision on that information alone, there is apparent fairness. However, that is not necessarily the case. The tribunal might conclude from the information which has been presented that there is an inconsistency in the applicant's account which is fatal to the application. The application may be rejected even though the applicant may have been in a position to offer a perfectly satisfactory explanation for that inconsistency, had the opportunity been provided.

In our refugee determination process, an inconsistency may become apparent to the SIO conducting an examination. The SIO might then take the initiative to explore that inconsistency for clarification or confirmation of the discrepancy. If he does not do so, the claimant may never have the opportunity of stating what, to him, might be obvious or simply not present to mind, but to the decision-maker might be crucial. The presence in the transcript of apparent contradictions, misrepresentations or the concealment of material facts may lead to rejection of the claim. The examination will not be reconvened to pursue these matters, even where the SIO has failed to do so on the original examination.

The SIO conducting an examination is not placed in an easy situation. On the one hand, he must be sensitive to the possible reticence of a refugee to speak freely and to give a full and accurate account of his case.

It is for this reason that the SIO is instructed not to adopt a cross-examination stance. On the other hand, the absence of probing questions may not be fair either, particularly where there is a subsequent determination that the claimant was not telling the truth. A person whose credibility is being impeached should be put on notice and given the opportunity of explaining.[60]

Parallel observations may be made with respect to the application of the refugee definition. If the government applies the definition in a manner which the claimant considers to be incorrect, he or his counsel should have the opportunity to make representations in support of another interpretation. The present exclusive reliance upon the transcript process totally removes the "give and take" of oral argument and the oral presentation of evidence which our systems of adjudication have long considered to be important to the defining of issues and the opportunity of the parties to respond to them.

One approach to this problem might be to elaborate upon the examination system by expanding the availability of "re-examinations". Provision might be made for the RSAC to provide each claimant with an opportunity to answer every material objection to his claim whether that objection goes to credibility or substance, fact or law. A list of apparent objections might be provided to the claimant whenever the RSAC is not prepared to make a positive recommendation to the Minister. The normal method of responding would be at a re-examination but the claimant might also be permitted to respond by way of affidavit or legal memorandum, depending on the nature of the objection.

However, such a procedure could prove to be cumbersome. The re-examination or affidavit could raise more new issues than it resolves. Would there then be another list of objections followed by another re-examination? Such a process would still lack the spontaneous "give and take" and the finality of an oral hearing by the (effective) decision-maker.

While the Immigration Act does not provide for an oral hearing, neither does it preclude one. Indeed, the RSAC claims the right to hear refugee claimants although it has not, to date, exercised that right. It would be possible to incorporate oral hearings into the existing system of examination and assessment of transcripts.

One approach might be for a hearing to be conducted for every claim which the RSAC considers, subject only to the preliminary rejection of patently frivolous claims. A hearing would be provided in every case where, if assumed to be true, the facts related in the transcript would found the claim. However, the criterion of "patently frivolous" would cause problems and little purpose would be served in burdening the RSAC with hearings where it has already decided, on the basis of the transcript, that it is prepared to make a positive recommendation.

The better approach would be to grant a hearing only in those cases where, after reading a transcript, a panel is not prepared to make a positive recommendation to the Minister. In these situations, the claimant should be provided with notice of the substance of the panel's objections to the claim in order to prepare for the hearing. At the hearing, itself, there would be no need to start from the beginning. The transcript of the examination could be treated as having been "read in" to the evidence and the hearing could immediately focus upon the relevant issues.

There is no doubt that this approach would radically transform the operation of the RSAC. The members would not only be required to read every transcript but they would also sit as a tribunal hearing some oral evidence and receiving oral representations in many cases. It would not be possible for the existing RSAC to move directly into this kind of process. The changes discussed earlier, with respect to the composition of the RSAC, would have to be implemented and additional resources would have to be made available. The Task Force is of the view that, in light of the comments made in the Introduction to this section, the cost is not too high.

Recommendation: A refugee claimant should be entitled to a hearing in every case where the RSAC is not prepared to make a positive recommendation on the basis of the transcript. The claimant who is granted a hearing should be given notice of the substance of the objections to his claim. At the hearing, the transcript of the examination should be taken as having been "read in" to evidence.

D. Decision by the Minister

1. The Actual Decision-Maker

Although, in fact, the RSAC effectively decides the vast majority of refugee claims, in law it merely advises the Minister. It is the Minister who is authorized by the Immigration Act to make the determination of refugee status. However, the Minister is also authorized by the Act, generally, to delegate the powers given to him with certain exceptions. This power does not fall within the exceptions and, in fact, has been delegated by the Minister.

Until April 1, 1981, it was the Director General, Foreign Branch of the Immigration Commission, who exercised this power of decision.[61] On that date, the instrument of delegation replaced the Director General, Foreign Branch, with the Director General, Priorities and Program Coordination Branch of the Immigration Commission. On June 1, 1981, the Minister extended the delegation to include the Director, Settlement Branch and the Special Advisor, Legislative Co-Ordination, Priorities and Program Co-Ordination Branch.

The Director General, Foreign Branch, did not inevitably accept the advice of the RSAC. In some cases, decisions were made contrary to the advice of the RSAC. In others, claims were referred back to that body for re-consideration.

2. Reasons for Determination

At one time, reasons were not given by the Minister for a negative determination. Such reasons now accompany each notice of a negative determination.[62]

This practice is highly desirable since the reasons can provide a claimant with some idea of why he was rejected. Adequate reasons may not convince the claimant that the determination was correct. However, they will demonstrate to him, and to the general public, that full and careful consideration has been given to his claim.

Adequate reasons will also provide the claimant with some basis for deciding to apply to the IAB for a redetermination. If such an application is made, the claimant will have a context in which to attempt to persuade the IAB that a redetermination should be made. Adequate reasons may also have

an informational value to the IAB. Since the Board does not have a "back-up" system for general country information, explicit reasons could, in the present process, provide information which is not otherwise available to the Board.

While the practice of providing reasons is laudable, the reasons which are actually provided are often inadequate to serve these purposes. They often consist merely of three or four sentences. They do not always deal with the substantial points which have been raised. They seldom relate the findings of fact upon which their conclusions are based and contain little in the way of reasoning. In the main, they are merely conclusions rather than reasons.

Once again, the problems of time pressures and inadequate resources come into play. However, the Task Force is of the view that, again, the fact and appearance of fairness must be given priority.

Recommendation: The reasons provided by the Minister for a negative determination should set out the relevant background information taken into account, the facts as found and the reasoning where applicable. They should deal with all of the substantial points raised by the claimant.

3. The Special Review Committee

The Special Review Committee, composed of senior officials of the Commission, reviews every negative determination by the Minister. The mandate of this Committee is to determine whether there are sufficient humanitarian and compassionate grounds to recommend to the Governor in Council that landing is warranted in spite of the fact that the claimant has been determined not to be a refugee.

An extra step is involved if the refugee claim originates in Quebec. For these claims, following a negative determination by the Minister, the case is sent to the Government of Quebec for its advice. That advice is then taken into account by the federal Special Review Committee but not necessarily accepted. This additional procedure flows from the Quebec-Canada Immigration Agreement which provides that the selection of persons who are in similar situations to refugees will be carried out jointly, taking into account the humanitarian aspects of their applications.[63]

The Special Review Committee does not only review cases which have arisen out of the refugee determination process. Field officers may also refer cases to this Committee provided they fall within specified categories. (See Appendix II). As a result, a refugee claimant may come before the Special Review Committee on a field referral prior to his refugee claim and, a second time, following a negative determination of his claim.

In determining whether or not there are sufficient humanitarian or compassionate grounds, the Special Review Committee is guided by a number of criteria (which are also set out in Appendix II). However, upon careful examination, it appears that the successful application of many of these criteria would not only establish humanitarian or compassionate grounds, but may also establish refugee status.

For example, the Special Review Committee will recommend a person for landing:

> (a) where a claim of oppression (as opposed to personal persecution) in the applicant's own country is so rigorous or severe as to make it inhumane to return the applicant.

The discussion in chapter two suggests that a person need not be singled out for persecution in order to be a refugee. An individual who meets this

criterion should normally fall within the definition of refugee.

The Special Review Committee will also recommend for landing:

> (b) persons from countries with severe exit controls, who have over-stayed their visits in Canada and who as result of returning home would suffer punishment of an inordinate severity in relation to their offence of over-staying.

Once again, the earlier discussion of the refugee definition indicates that a person need have no political activity or opinion in order to be a political refugee. A well-founded fear of persecution based on political opinion may stem from what is considered to be political in the opinion of the persecuting government. Nor need a person be a refugee at the time he leaves his home country. He can become a refugee after he has left, a refugee sur place.

Another criterion relates to:

> (e) persons who are members of official delegations, athletic teams or cultural groups, etc., who, by seeking to remain in Canada, so embarrass their Government as to leave themselves open to severe sanctions should they return home.

Again, such persons would be refugees sur place.

If the Draft Guidelines presented in chapter two are adopted and applied, there will be no need for the Special Review Committee to apply these criteria to refugee claimants. Their status as refugees ordinarily will have been recommended by the RSAC and determined by the Minister.

Nevertheless, there is a value in the Special Review Committee continuing to apply these criteria in references directly from the field. If this Committee is in a position to make a quick determination on the basis of humanitarian and compassionate grounds, the longer and more complicated refugee determination process may be avoided. The same may be said of the non-refugee related criteria which are applied by the Special Review Committee:

(c) persons who could not apply for an immigrant visa from their own country but had they been able to do so would have met our selection criteria.

(d) persons who, because of some special family situation within Canada should be allowed to remain.

(f) persons requiring some special form of care that is available and offered in Canada and which is not available in their own country.

If a person is to be landed for any of these reasons, it would seem to make more sense to land the person before a refugee claim is made rather than waiting until the claim has worked its way through the entire refugee determination process with the corresponding delay to the claimant and burden upon the system. Field officers should, therefore, be encouraged to refer cases to the Special Review Committee where it is apparent that they fall within the criteria, even though a refugee claim is likely to be made, or already has been made.

The review by this Committee following a negative determination by the Minister should continue. The claim itself might elicit humanitarian considerations which were not previously apparent.

Recommendation: Field officers should be encouraged to refer cases to the Special Review Committee where it is apparent that they fall within the criteria, even though a refugee claim is likely to be made or already has been made.

E. The Right to Remain

It has already been indicated that a positive determination of refugee status does not necessarily ensure that the refugee will be permitted

to remain in Canada.[64] He must first be given a Minister's permit, which confers the status of being "lawfully in Canada".[65] After a person has been found by the Minister or the Immigration Appeal Board to be a Convention refugee, he will normally be issued such a permit, with permission to work, and processing for landing will be commenced.

However, the right to remain may be revoked by the operation of section 4(2) of the Act. It was pointed out under heading B. above (The Examination) that where the subject of an inquiry claims to be a Convention refugee, the Act provides for the adjournment of the inquiry and the examination of the claimant under oath. This is the commencement of the refugee determination process. Once that process has been completed, the Act provides that the inquiry must be resumed. Where the claimant has been determined not to be a Convention refugee, the adjudicator must then make a removal order or issue a departure notice to the unsuccessful claimant.[66]

If the claimant has been determined to be a Convention refugee, the adjudicator must then make the further determination whether that successful claimant also meets the requirements of section 4(2) of the Act. If those requirements are not met, a removal order or departure notice must follow, even though the person has been determined to be a Convention refugee.[67]

The requirements of section 4(2) may be described, very generally, as follows:

(1) The Convention refugee must be "lawfully in Canada". In other words, he must be in possession of a Minister's permit.

(2) He must not fall within certain categories related, essentially, to security or criminal conduct.

Where these requirements have been met, the Convention refugee must be allowed to remain in Canada.[68]

While a Minister's permit will be granted in most of these cases, it will not be given automatically. A Minister's permit will not be given to a Convention refugee who is already protected by or returnable to a country other than one where his life or freedom will be threatened.[69] In such circumstances, he will have to return to the country which had previously offered him protection.

The Convention refugee may be left quite oblivious of the application of this criterion until after the actual determination has been made. He is not put on notice so that there is no formal opportunity to submit evidence or argument. It is true that the refugee may appeal the "protection" determination to the Immigration Appeal Board as of right. If the Board disagrees with the Minister's determination, the appeal can be allowed on humanitarian grounds.[70]

Nevertheless, there appears to be no good reason not to provide a specific opportunity to the refugee to submit evidence and argument on this issue prior to the Minister's determination. Unnecessary appeals might occasionally be avoided. Moreover, in recognitition of the duty of the UNHCR to ensure that refugees are protected,[71] it would be appropriate to give notice to the UNHCR representative as well.

Recommendation: Before an adverse determination is made on the issue of "protection", both the refugee and the UNHCR representative should be given notice that the right of the refugee to remain in Canada is in question. The

refugee should be allowed to submit evidence and make representations on this issue prior to the initial determination.

F. In Status Claims

1. Introduction

The Immigration Act provides for a claim to refugee status to be made only during an inquiry. Once a person has entered Canada, he will normally be the subject of an inquiry following a report that he has lost status to be in Canada. Thus, the Act does not provide for a person to make a refugee claim if he is "in status" to be in Canada, whether as a visitor or as a student or on an employment authorization. In the past, this omission from the Act was construed as requiring that such a person would have to be "out-of-status" in order to make a claim.

Nevertheless, the Immigration Commission has now adopted the policy of permitting in status claims to be made.[72] This policy is welcome. Moreover, if the in status claim is denied, the claimant may allow his status to expire and make a second, out-of-status, claim at his inquiry, in accordance with the Act. (A second in status claim will not be permitted.)[73]

2. Work Permits

The Immigration Commission takes the position that only out-of-status claimants are eligible to apply for work permits. The Regulations provide that an application for an employment authorization may be made by "...a person who has made a claim to be a refugee which claim has not been finally determined".[74] The interpretation given to this provision by immigration officials is that it does not apply to in status claimants since

they are not statutory claimants.[75] As a result, sometimes on the advice of counsel or immigration officers, claimants are allowing their visas to expire before making a refugee claim so that they may apply "out-of-status" and be eligible for employment.[76] There are disadvantages associated with following this route. It delays the point at which a claim can first be made. Furthermore, the credibility of a claim can be diminished by the delay in making it. Moreover, the person over-staying may be committing an offence contrary to section 95(k) of the Act and those who advise him to do so may be counselling the commission of an offence.

In the view of the Task Force, the present interpretation demonstrates some inconsistency. Since "in status" claims are now recognized (as they should be), they should be recognized for the purpose of issuing employment authorizations. It would be desirable to establish this practice by amendment to the Regulations.

Recommendation: The Regulations should define in status claimants and specifically authorize an in status refugee claimant to be eligible for a work permit.

3. Redetermination of In Status Claims

The wording of the Immigration Act still has the effect of precluding an unsuccessful, in status, refugee claimant from applying to the IAB for a redetermination. Nevertheless, if the claimant makes a second, out-of-status, claim and is refused again, he may apply to the IAB for a redetermination of the second claim.

The Immigration Manual instructs immigration officers to advise a potential in status refugee claimant that he will have no right to apply to the Immigration Appeal Board for a redetermination after having been advised of the Minister's decision on his claim.[77] At least one Canadian immigration office requires such a claimant to sign a form stating that he was informed that, if he was refused refugee status by the Minister, he would not have a right to apply to the Immigration Appeal Board for redetermination. (See Appendix IV.)

The information which the Immigration Officer is instructed to give, is correct. However, because it is incomplete, it may be misleading. It may lead to the inference that by making an in status claim, the claimant is forfeiting the right to apply to the IAB for a redetermination. In fact, such a right is only delayed. While an application for redetermination cannot be made following denial of the in status claim, it can be made following the denial of a subsequent out-of-status claim. Indeed, the Minister's standard refusal letter to an in status claimant is more complete. It states:

> ...should you...in the future, become the subject of an inquiry under the Immigration Act 1976, you will be entitled to submit a new claim to refugee status pursuant to subsection 45(1) of the Act.

It is preferable, if any advice is to be given to an in status claimant, that it be complete.

Recommendation: If in status claimants are to be advised of the rights available to them, they should be told not only that they will not be able to make an initial application for redetermination to the IAB, but also that they

will be entitled to make a second out-of-status claim should they become the subject of an inquiry and that an application to the IAB would be available if the second claim is denied.

4. Statutory Change

The majority of the recommendations in this Report can be implemented administratively or through amendment to the Regulations. Since the last amendments to the Immigration Act were both recent and comprehensive, the Task Force does not anticipate that further legislative change is imminent. Nevertheless, this Report also contains recommendations for statutory change, particularly in chapter six, for consideration when the time is ripe.

At that time, a statutory basis should be provided for in status claims. Although they are now allowed administratively, and should continue to be allowed, the wording of the Act permits them to be recognized only incrementally to out-of-status claims, which are specifically authorized by the Act. The result is double claims. The Act should be changed to permit in status claims, with a right to apply for redetermination to the Immigration Appeal Board from a negative determination of an in status claim. In such circumstances, an in status claimant should not be entitled to make a second, out-of-status claim. (Of course, a person who becomes a refugee through a change in circumstances, after his claim has been refused, would be treated in the same way as a present unsuccessful, out-of-status claimant who subsequently becomes a refugee through a change in circumstances. He would be allowed to remain by administrative discretion rather than by a claims entitlement system.)

Recommendation: The Immigration Act should be amended to allow in status claims, as an alternative to out-of-status claims, with a right to apply for redetermination to the Immigration Appeal Board.

CHAPTER FOUR

REDETERMINATION AND REVIEW OF REFUGEE CLAIMS

A. The Immigration Appeal Board

1. Time to Apply for Redetermination

Until recently, when a claimant was determined by the Minister not to be a refugee, he had only seven days to apply to the IAB for a redetermination. The Regulations have now been amended to extend the tme limit to fifteen days.[78] However, even fifteen days is short by normal standards. The application for redetermination is not comparable to a mere notice of appeal.

The Act specifically requires that the application be accompanied by a declaration of the applicant under oath setting out:

> (a) the nature of the basis of the application;
>
> (b) a statement in reasonable detail of the facts on which the application is based;
>
> (c) a summary in reasonable detail of the information and evidence intended to be offered at the hearing; and
>
> (d) such other representations as the applicant deems relevant to the application.

In these circumstances, thirty days would be a more appropriate time limit.

Moreover, the time to apply for redetermination is fixed. It cannot be extended by the Minister or by the Board. Even the most meritorious case, filed late for the best of reasons, is beyond the power of the Board to consider. Ordinarily, when times for appeals are set out, there is power to extend the time for cause. The Board should be given such a power.

Recommendation: The Regulations should be amended to extend the time for applying for redetermination to thirty days and to authorize the IAB to extend this time for just cause.

The present time limit is established by the Regulations rather than by the IAB Rules. Thus, the time limit is determined by the Governor in Council on the recommendation of the Minister rather than on the recommendation of the IAB itself. Normally, the courts establish their own times for appeal and it would be preferable for the Board to have this power. However, it appears that an amendment to the Act would be required to authorize the IAB to establish times for appeal. The Act should be so amended at the appropriate time.

Recommendation: The Immigration Act should be amended to give the IAB the power to make rules governing the time limit for making an application for a redetermination.

2. Hearings

The Immigration Act establishes a two-stage process for the IAB in dealing with applications for redetermination.

First of all, the Board must consider the written material to determine:

> ...if, on the basis of such consideration, it is of the opinion that there are reasonable grounds to believe that a claim could, upon the hearing of the application, be established....[79]

If the decision is negative, the applicant will be determined not to be a Convention refugee.

If the decision is positive, the Board will proceed to the second stage of holding a hearing. The applicant will then be permitted to appear before the Board, either personally or by counsel, and to make oral representations with respect to the claim.

Although the current provisions were only brought into force in April of 1978, the previous system was very similar. A two-stage process existed, even though it was called an "appeal" rather than a "redetermination".[80] The notice of appeal had to be accompanied by a declaration.[81] If on the basis of a consideration of the declaration, the Board was of the opinion that there were reasonable grounds to believe that the claim could, upon a hearing of the appeal, be established, the Board was to allow the appeal to proceed.[82]

Under this earlier system, the Board had decided to grant every refugee claimant an oral hearing at the level of the application to allow the appeal to proceed. In the case of G. L. Diaz-Fuentes,[83] the Vice-Chairman of the Board, Mr. J. P. Houle, said that to decide whether or not to allow the appeal to proceed on the basis of the declaration of the refugee claimant alone, without an oral hearing, would be "arbitrary", "repugnant to our concept of the judicial process" and "contrary to the accepted notions of fundamental or natural justice".

However, the practice of granting oral hearings in every claim coming before the IAB was terminated by the Fuentes decision. In that case, the Federal Court of Appeal held that the Board must decide against the claimant:

> ...if after considering the declaration (of the applicant) and not, it be noted, on the basis of facts which may be established in any hearing the Board may hold, the Board concluded that the claim is not a serious one.[84] [Emphasis added]

The request or agreement of the applicant to take into consideration further evidence adduced at a hearing would not alter the requirement to decide on the basis of the declaration and transcript.[85]

The Chairman of the IAB appeared before the Parliamentary Committee which was considering the bill to establish the new Immigration Act. She stated that, in the view of herself and her colleagues:

> ...all refugee claims redeterminations should be heard. The Board should be required to hold a full hearing in all cases. A man's life is involved and the Convention is a highly complex International Treaty.

Nevertheless, Parliament saw fit to establish the two-stage process which does not require a full hearing in every case.

The current test for deciding whether or not to grant a full hearing is an unusual authority. Mr. Justice Le Dain, of the Federal Court of Appeal, has pointed out that it requires redetermining:

> ...at a preliminary stage, not whether there is an arguable case, but whether there is a probability or likelihood of success, without knowing what a full hearing might add to the strength of the case. It is an authority that gives rise to understandable concern....[86]

However, the process has been established by the Act and can only be changed by legislative amendment.

One suggestion for avoiding the present restrictions on oral hearings is that the IAB should allow every application for redetermination to proceed where credibility is in question. In other words, on every application for redetermination, the IAB should assume that the facts as alleged are true.

While such an approach might well reduce the problems created by the current provisions, the Federal Court of Appeal has rejected it as a matter of law. The Court has held[87] that it is not sufficient for the Board to decide that the facts alleged, if true, could make the claimant a refugee. The Board must also decide whether the allegations of fact could be proven. The Board is required by law to examine the truth or falsity of the allegations of the claimant at the first stage, i.e., before the Board has ever had the opportunity to hear the claimant.

The obvious suggestion is that the Act should be amended to permit oral hearings before the IAB. A low preliminary threshhold might still be established to eliminate frivolous claims. However, this Report has already recommended that the RSAC hold a hearing for every claimant whose claim it is not prepared to recommend without a hearing and that more elaborate reasons be given when determinations are made. If a full oral hearing is provided by the RSAC, the availability of a full hearing at the IAB level will become less crucial. Questions of fact and, particularly of credibility, could be resolved with greater confidence at the lower level so that the IAB determination would focus more on questions such as the scope of the refugee definition.

Nevertheless, the IAB should be permitted greater scope in granting oral hearings on applications for redetermination. A claimant should not have to prove likelihood of success before he is heard. He should only have to prove that he has an arguable case. More comprehensive recommendations for statutory changes are advanced in chapter six. However, if these are not adopted, the Act should be amended at least to

allow oral hearings at the Immigration Appeal Board for all but frivolous application.

Recommendation: If the more comprehensive recommendations for statutory changes presented in chapter six are not adopted, the Immigration Act should be amended at least to permit oral hearings by the IAB for all but frivolous applications.

3. Standard of Proof

Ordinarily, when an adjudication is to be made, and no standard of proof is specified, the standard of proof "on a balance of probabilities" is adopted. This is also the legal test applicable to civil proceedings and it has been held that immigration hearings are civil, rather than criminal, in nature.[88]

However, the Act provides for the IAB to make a "redetermination" of the applicant's claim that he is a Convention refugee. Presumably, this means that the Board must place itself in exactly the same position as that which the Minister occupied when making a "determination". In the view of the Task Force, the standard of proof applicable to the Board on a "redetermination" must be ascertained by examining the standard applied by the Minister on a "determination".

It was suggested in chapter two that the proper test for the Minister to apply was slightly lower than the "balance of probabilities". The Minister should resolve any doubt in favour of the claimant. This means that if, on balance, the evidence is in doubt, the claimant should succeed whereas he would have failed if he were required to establish his claim on a "balance

of probabilities". The IAB should, therefore, also resolve any doubt in favour of the claimant on an application for redetermination.

This test in making the actual redetermination should not be confused with the test set out in the Act for deciding whether or not to allow a claimant's application to the Board to proceed to a hearing. The test as to whether or not a hearing should be permitted must be decided on the basis of the wording in the Act, which was discussed under the previous topic, i.e., whether or not there are reasonable grounds to believe that a claim could be established if a hearing were to be held. Of course, the question of whether or not a claim "could be established" depends, in turn, upon the test which is applied by the Minister in determining whether or not a claim is established. In other words, in deciding whether or not to grant a hearing, the IAB should bear in mind that, at the hearing (just as before the Minister earlier), the claimant will be given the benefit of the doubt.

However, in interpreting present statutory criterion for whether or not to permit a hearing, i.e., the criterion of whether or not a claim "could be established", the Federal Court of Appeal has said:

> [It] requires the Board to refuse to allow the application to proceed, not only where the Board is of the opinion that there are no reasonable grounds to believe that the claim could be established, but, also, when things are so evenly balanced that the Board cannot form an opinion on that point. In other words, the applicant does not have the benefit of the doubt; on the contrary, the doubt must be resolved against him.[89]

These comments do not, in any way, inhibit the Minister in adopting a standard which would give the benefit of the doubt to the claimant. Nor do they modify what was said earlier with respect to the tests to be applied by the IAB.

It might be useful to summarize this discussion in point form:

(1) In making a determination, the Minister should apply the standard of proof on a balance of probabilities but with any doubt resolved in favour of the claimant.

(2) In making a redetermination, the IAB should apply the same test.

(3) In deciding whether or not a hearing should be granted, the IAB must apply the statutory criterion of whether or not a claim "could be established" if a hearing were held.

    (a) In making this decision, the IAB must bear in mind the test which it would apply at the hearing, i.e., the test referred to in (2).

    (b) In making this decision, and having regard to the test which it would apply at the hearing, if it is in doubt about whether or not the claim "could be established", it must deny the hearing (as expressed in the earlier quotation from the Federal Court).

Therefore, consequent upon the Minister adopting the standard of proof on a balance of probabilities but with any doubt being resolved in favour of the applicant, for the determination of refugee claims, it should be expected that the IAB would adopt the same standard for redeterminations.

4. Expertise of the Board

(a) Specialization

The IAB has had experience with refugee matters prior to the present Act. Under the Immigration Appeal Board Act (1966-67), the Board had the power to quash an order of deportation where there were reasonable grounds for believing that, if the order were executed, the person concerned would be punished for activities of a political character.[90] From 1973 to

1978, the Board had the power to quash an order of deportation where the Board had reasonable grounds for believing that the person concerned was a refugee protected by the Convention.[91]

Nevertheless, the IAB has been criticized, on occasion, for a lack of expertise in refugee matters. The unique position and problems of refugees may require a special sensitivity which the present size and distribution of the Board do not permit all members to develop. In addition, refugee redetermination requires a detailed knowledge of the refugee definition. Greater expertise could be achieved by exposing fewer members to refugee cases, thereby concentrating their experience in this area.

The Task Force sees merit in the suggestion that the IAB establish a special refugee panel to which all refugee applications would be referred. However, at present the Board functions by means of regionally located panels with members residing in Montreal, Ottawa, Toronto and Vancouver. Redetermination hearings are held by a regional panel although applications to proceed to a hearing are read by two members from the region where the claim arises and one outside member. A specialized panel for refugee claims would, therefore, mean establishing a national travelling panel. However, bearing in mind the desirability of centralization and uniformity in refugee determination, such a panel is attractive. It might consist of certain members designated from each of the regions, to come together as required to deal with all refugee claims.

Recommendation: The IAB should establish a specialized panel both to deal with applications for redetermination and to conduct redetermination hearings.

(b) Country Information

The Board is free to take judicial notice of public events.[92] It may examine newspaper reports,[93] or any other background country information when deciding whether or not to allow an application to proceed. If a hearing is granted, this information may be examined and expert witnesses on country conditions may be heard.[94] However, at the present time, the Board is frequently faced with inadequate background country information.

The recommendations made earlier in this Report with respect to such information (at examinations, before the RSAC and in the reasons of the Minister) should all assist in providing the IAB with better information. The previous recommendation with respect to a specialized panel would also assist by exposing certain members to more cases and, therefore, to more country information.

The Task Force is of the view that it would also be of value for counsel for the Minister at redetermination hearings to present additional country information where appropriate. Such information may be available to the Commission but absent from the material filed and not available to the applicant or the Board. Whenever possible, such information should be provided to the claimant in advance of the hearing.

Recommendation: The Minister's counsel should present background country information at redetermination hearings, where such information is available to the Minister but does not otherwise appear to be available to the applicant or the Board.

5. Reasons

The Act specifically provides that "the Board may, and at the request of the applicant or the Minister shall, give reasons for redetermination."[95] The Board does not, as a matter of practice give reasons, automatically, in every case. Ordinarily, only the decision is communicated to the applicant. If a request is then made for reasons, they will follow.

However, a notice of application to review and set aside the IAB redetermination must be filed in the Federal Court of Appeal within ten days of receiving the decision. Even if reasons are requested immediately, they will not be received within ten days of receiving the decision. As a result, the applicant whose redetermination has not succeeded must decide whether to apply to the Federal Court of Appeal before seeing the Board's reasons or to forfeit altogether his right to apply there.

It is true that the Federal Court of Appeal has the power to extend the ten day limit.[96] However, the time will not be extended solely because the IAB reasons were not available to the applicant within that ten day limit.[97]

The absence of reasons within this period may prompt unnecessary applications to the Federal Court of Appeal. Good reasons, convincingly written, will dissuade a denied applicant from going to the Federal Court of Appeal. Without reasons, an applicant concerned about protecting his position, will automatically file a notice in the Federal Court of Appeal, because of the possibility that the reasons, once they arrive, will show a reviewable error.

The Act does not specify when the request for reasons must be made and seems to permit the request to be made prior to the decision being received. If that is the case, applicants would be well-advised simply to request reasons in every application for redetermination. However, it would be preferable if the IAB were simply to adopt the practice of giving reasons with every redetermination that an applicant is not a Convention refugee. Reasons for positive redeterminations, ordinarily, would not be required since it is the practice of the Minister not to apply to set aside such decisions.

Recommendation: The Immigration Appeal Board should adopt the practice of providing reasons together with every redetermination that an applicant is not a Convention refugee.

B. Further Review

An application for review by the Federal Court of Appeal is not a general appeal from an IAB decision.[98] In order to be successful at this level, the applicant must persuade the Court that the Board had fallen within one of a number of specified, narrow categories of error.[99]

An appeal from the Federal Court to the Supreme Court of Canada is also possible. However, it will be limited to whether or not the Federal Court of Appeal had been correct in its decision with respect to those narrow categories of error. Moreover, such appeals to the Supreme Court of Canada are only by leave of the Court. Ordinarily, the Court will only grant leave where the appeal raises a question of "public importance".[100]

The point here is simply that the adequacy of the procedures for refugee determination and redetermination should not be diminished in importance because of the availability of judicial review. The role of the courts in refugee determination, as with a broad range of decision-making by administrative bodies, is merely to provide a blunt solution (quashing the earlier decision) where certain specific errors can be demonstrated.

The procedures and practices in our refugee determination process must be addressed directly and without the illusion that we can rely upon the courts to redress any potential inadequacies.

CHAPTER FIVE

OVERSEAS PROCEDURES

A. Refugee Status Granted Abroad

1. Claims "At Home"

(a) General

The refugee definition, both in the Immigration Act and in the United Nations Convention for Refugees, excludes those who are inside their country of citizenship. Nevertheless, there are three countries for which our regulations permit refugee claims to be made "at home", i.e., within the country from which the claimant seeks refuge. These countries are Uruguay, Argentina and Chile.[101]

(b) The Visa Requirement for Chileans

Citizens of Uruguay and Argentina do not require tourist visas to come to Canada.[102] These citizens, therefore, have the options of claiming refugee status at home or of coming to Canada to claim refugee status. Chileans do not have such a choice. In order to come here as a visitor, a Chilean must first receive a tourist visa at a Canadian mission abroad.[103] However, that visa will normally be denied if he indicates that he intends to claim refugee status while in Canada. Ordinarily, his refugee claim would have to be processed in Chile.

Opposing views have been expressed as to the effect of the Chilean visa requirement coupled with the opportunity to claim refugee status at the Canadian embassy in Chile. One perception is that the system does allow the claims to be processed accurately and fairly. The other view

is that it does not work because refugee claimants are intimidated from making a claim in their own country. Moreover, in this second view, those who do make claims are not properly assessed because the Canadian embassy in Chile does not have the expertise and background information for an accurate assessment. While the embassy relies on a private church organization (the Vicaria) for assistance, the prime function of that body is not the evaluation of refugee claims. Not long ago, an independent fact-finding team, which had visited Chile, reported that there was no major problem for anyone who wished to apply for refugee status through the Canadian embassy in Chile.[104]

Later in this chapter, under the general heading of "The Visa Requirement", it is recommended that a visitor's visa should not be denied solely on the basis that the person wishes to claim refugee status in Canada. Should different considerations apply where the claimant has the special right to apply in his home country?

Even if the Canadian mission in Chile is capable of accurately assessing every refugee claim and even if, in fact, our mission may be approached without detection, genuine refugees still may be reluctant to claim at home. The fear of detection may prevail whether or not it is well-founded. The opportunity to make claims at home should not be used as a justification for refusing to grant visas which would allow a refugee claim to be made in Canada. In other words, granting claims in the home country should not result in the prohibition of claims in Canada or in a third country.

Nor should the availability of at home claims necessarily weaken the credibility of claims which were made abroad rather than at home. This

consideration was included in the Draft Guidelines respecting credibility which were presented in chapter two.

(c) The Value of "At Home" Claims

Although the availability of "at home" claims is not something which is expected of Canada by the U.N. Convention,[105] nevertheless, their availability can be of great value in certain circumstances.

Canada may wish to land refugees whom we have identified in the home country but who are unable to leave to make claims abroad or in Canada. The government of a country may be prepared to allow a person to leave as a refugee to come to Canada but not allow him to leave for any other reason. Canada has admitted persons from Uruguay, Argentina and Chile who were held in jail for political reasons. To require such persons to claim refugee status outside of their own country would be totally to deny them the possibility of seeking refugee status in Canada.

In some situations, the home country may be willing to permit certain persons to leave, whether as refugees or for any other reason. It is administratively more convenient to have these refugees come directly to Canada from their home country rather than require them to go to a third country and claim refugee status there.

The Task Force is of the view that the opportunity for direct refugee departure from Uruguay, Argentina and Chile should not only be retained but should also be extended to other countries in certain circumstances. Not every refugee-producing country is prepared to allow Canada to organize direct refugee departure from within the boundaries of the refugee-producing country. However, where such countries are willing to

allow direct departure, Canada should permit "at home" claims from those countries.

Recommendation: For those countries permitting direct refugee departure, Canadian visa officers should have the power to issue immigrant visas to refugees applying within their country of citizenship or habitual residence.

2. Claims Abroad

(a) Country Information

The Immigration Act and regulations allow a person neither in Canada nor in his home country to approach a Canadian embassy and claim refugee status in Canada.[106] The procedure abroad is quite different from the procedure in Canada, which was discussed earlier. When claims are made abroad, the procedure simply involves an interview by an immigration officer abroad, who then makes the refugee determination.[107] All negative determinations (except in one-man posts) require the concurrence of a senior immigration officer.[108]

In assessing the reasonableness and credibility of each claim, the officer may have only his own judgment and knowledge of world affairs upon which to rely.[109] In contrast, claims made in Canada are processed centrally specifically to allow the development of expertise and to facilitate the accumulation and availability of political information from around the world.

A study done for the Immigration Commission had suggested that each claim rejected abroad be re-examined in Canada by a panel of the Refugee Status Advisory Committee if the claim is not of a capricious nature. A claim would be considered to be capricious if the claimant is a

national of a country with a democratic history. The rationale expressed for this approach was that Canadian citizens have "a just expectation that all procedural acts abroad conform to postulates valid in Canada, in other words, that they conform to the spirit of natural justice".110

While there is a logical symmetry to the suggestion, the Task Force simply does not consider it to be practical. The additional resources required to implement the recommendations already made in this Report would be substantial. Those required to process foreign claims in Canada would be prohibitive. Moreover, the processing time would be greatly extended, even without a backlog of cases.

The lack of country information from which posts abroad suffer is better met by sending the information to them, than by sending the claims to Canada. This Report has already discussed the development of adequate country information for the purpose of processing refugee claims. Such information should be made available to posts abroad. In assessing these claims, an officer abroad should be able to supplement his personal knowledge of world affairs with that which is available to the Government of Canada.

Recommendation: Adequate country background information should be made available to Canadian posts abroad for the purpose of assisting immigration officers abroad in determining refugee eligibility.

(b) Handicapped and Unskilled Refugees

The Immigration Act reflects a difference in treatment of unhealthy and unskilled refugees based upon whether their claim is made in Canada or abroad.

Within Canada, a person who has been determined to be a Convention refugee may still be expelled if he has been convicted of a particularly serious crime or if he is a security danger to Canada. However, a refugee, who is lawfully in Canada, may not be expelled simply because he is handicapped or unskilled.[111] To do so would be in violation of the U.N. Convention.

A refugee abroad does not receive the same protection from the Convention. The difference is reflected in the requirements of our Act and Regulations, which must be met by a Convention refugee abroad who is seeking resettlement in Canada. One of the provisions of the Act is that no person shall be granted admission if he is a person suffering from a health requirement as a result of which his admission might be reasonably expected to cause excessive demands on health services.[112] Another is that no person shall be granted admission if he is suffering from a health impairment as a result of which he is likely to be a danger to public health.[113]

Moreover, a Convention refugee abroad, seeking resettlement in Canada, must persuade the visa officer that he is able to become successfully established in Canada.[114] For the purpose of determining the likelihood of being successfully established in Canada, a visa officer is to take into consideration factors by which an independent applicant for immigration is assessed as well as whether any person or group in Canada is seeking to facilitate the admission of the refugee.

Although the Convention does not impose a direct obligation upon us to admit handicapped or unskilled refugees who are outside of Canada, an indirect obligation does exist. It is the general obligation to co-operate with other countries in the world to share the refugee burden.[115]

Canada has been criticized in the past for taking the "cream" of the refugee "crop". We have taken our share and more than our share of refugee settlement movements. However, we have taken a very high number of the young, the healthy and the educated in comparison to the unhealthy and the unskilled.

The Immigration Commission does have a special program for handicapped refugees who are applying from abroad.[116] If the handicapped person is single, in order to be eligible he must demonstrate that, following treatment, he will be capable of eventual successful establishment in Canada.[117] If he is a member of a family group, the family must satisfy the visa officer that they will, as a group, and within a reasonable period, become self-sustaining.[118] In addition, the acceptance of a handicapped refugee requires the concurrence of the government of the province of destination. Hospital and medical expenses are to be paid by the participating provincial government.[119]

The federal government also has the authority to pay for the hospital and medical expenses of handicapped refugees. An Order in Council authorizes Health and Welfare Canada to pay the cost of medical care and hospitalization for any person who is subject to immigration jurisdiction or for whom the immigration authorities feel responsible.[120] However, this authority is not invoked for handicapped refugees.

Since a handicapped refugee is medically inadmissible under the Act, those who meet the criteria of the special program are given Ministers' permits. The Act permits the Minister, generally, to issue a permit authorizing a person to come into Canada if that person is a member of an inadmissible class.[121] The Manual provides that such permits are to be given when refugee resettlement factors are sufficiently strong to justify allowing

individuals to come into Canada, notwithstanding that they are otherwise inadmissible.[122] Unskilled refugess are not admitted unless there is a sponsorship group which will assist them.

Canada could remove the requirement of the likelihood of successful establishment simply by changing the regulations. Moveover, simply as a matter of policy, the Minister could give permits to handicapped refugees, whether the provinces agree to their admission or not. The federal government would then have to pay for their treatment once admitted. However, the Task Force is of the view that the better course would be for the federal government actively to pursue greater support for unskilled and handicapped refugees with those upon whom it now relies, namely private sponsoring groups and the provinces.

The Handicapped Refugee Program has not, to date, generated significant numbers. The year 1981 is the International Year of Disabled Persons. One appropriate response to this International Year would be for Canada to admit a larger share of the world's handicapped refugee population than have been admitted in the past.

Recommendation: The Government of Canada should pursue with private sponsorship groups and the provinces, greater support for the admission of handicapped and unskilled refugees.

B. Special Humanitarian Programs

1. Temporary Humanitarian Programs

The Government of Canada, from time to time, adopts temporary humanitarian programs to assist those who seek residence in Canada during a

period of conflict or turmoil in their homeland. The people for whom these programs are intended are, for the most part, refugees. In the past year, Canada has had such programs for Lebanon, Cyprus, Ethiopia, Iran and Iraq. Most recently, Canada has announced such a temporary program for El Salvador.[123] While the temporary humanitarian programs vary in detail from program to program, they have a number of common features.

The current El Salvador program is typical of past programs. A person from El Salvador at a port of entry and otherwise removable will not be removed to El Salvador. Instead, removal orders will be held in abeyance. Visitors in Canada from El Salvador will be allowed to stay and to work. Those in Canada who seek landing will be able to land from within Canada, either if they have family here, or if they demonstrate through employment that they are able to become successfully established in Canada. Those in Canada committing transgressions of the Immigration Act will be scheduled for inquiry only for major transgressions. Inquiries for minor transgressions will be adjourned. Where an internal inquiry for a major transgression results in a removal order, this order, like a removal order from a port of entry, will be held in abeyance.[124]

Although Canada does not have an overall temporary refugee policy, these temporary humanitarian programs provide not only temporary refuge but also a relaxation of the rules for landing. In the view of the Task Force, these programs represent an appropriate and flexible response to situations of crisis.

2. Self-Exiled Class

(a) Membership

Reference was made earlier to Uruguay, Argentina and Chile, which form the Latin American Designated Class. The purpose of this designation was to allow a person falling within the class to apply for refugee status from within his country of citizenship.[125] However, such claimants must still establish that they are refugees.

Citzens of countries in the Self-Exiled Persons Class do not have to establish that they are refugees. The special treatment accorded to persons falling within this category appears to be based on the following principles: firstly, that generally oppressive conditions exist in these countries; secondly, that exit controls exist and a person will be in difficulty with his government simply by leaving without permission or by staying outside of the country beyond the limited time; thirdly, that there are a significant number of co-nationals or former co-nationals in Canada who will facilitate resettlement.

The admissibility requirement (of being able to become successfully established in Canada) is usually met by virture of "umbrella" agreements between the Government of Canada and Canadian organizations prepared to sponsor the self-exiled applicant.

Such agreements are not restricted to the self-exiled class but also exist with respect to refugees from other countries.[126] A total of more than forty such agreements have been signed to date. Nevertheless, a person who is covered by one of the agreements but who does not fall within the self-exiled (or Indochinese) class must still establish that he is a Convention refugee before being eligible for admission.

The self-exiled class applies to Eastern European countries and Haiti. While the existence of the self-exiled class is desirable, membership within it should be reviewed from time to time against the principles outlined above. Countries should be deleted from the class if the principles no longer apply to them and should be added to the class if the principles do apply.

Recommendation: Membership in the self-exiled class should be reviewed in light of the principles upon which this class has been established.

(b) Landing Within Canada

A member of the self-exiled class does not have to establish that he is a refugee. He need only show that he is outside his country, that he is unable or unwilling to return, that he is outside of Canada and that he is seeking resettlement in Canada.[127]

As a consequence, it is a good deal easier for a member of the self-exiled class to be landed when applying from a third country than when applying from Canada or from home. Applying from home, a member of this class must satisfy the normal Canadian immigration criteria. If a near relative is not sponsoring him, he must qualify under the points system. Ordinarily, this means that he must show he has a job for which no Canadian is available. If he is within Canada and makes a refugee claim, he must show that he has a well-founded fear of persecution if returned to his home country. However, if he applies from a third country, he need satisfy neither the regular immigration criteria nor the refugee definition.

Nevertheless, the self-exiled person may be placed in a difficult position by delays in processing his application in the third country. Medical

and personal background checks still must be done and there may be a backlog of applications. Although he is anxious to begin his new life in Canada and has assistance awaiting him here, he may have to remain "in limbo" in the third country and sometimes for a substantial length of time.

If the self-exiled person does come to Canada, he may be considered for landing, apart from a refugee claim, by the Special Review Committee, on the basis of the criteria which were discussed earlier in this chapter. However, he still would not be in as favourable a position as if he had applied from a third country. If he applied from a third country, he would be permitted to immigrate to Canada quite apart from whether or not he fell within the terms of reference of the Special Review Committee. These are not applicable to him in a third country, where his self-exiled status is his key to admission.

The basis for this discrepancy is the general proposition that landings from within Canada are contrary to the general policy of the Immigration Act, although the power to make exceptions does exist. The Act provides that, except in such cases as are prescribed, every immigrant and visitor shall make an application for and obtain a visa before he appears at the port of entry.[128] This policy was established as a result of the problems which were created in the past by generally permitting landings from within Canada. Visitors arrived in increasing numbers and made applications here. Backlogs were created and, while applicants awaited the final disposition of their applications, personal ties with Canada were established. These personal ties created humanitarian grounds for landing even though the original application might have been refused. In the end, the selectivity of the process disappeared and landing was granted almost "on demand".

On the other hand, to apply the present general policy to self-exiled persons may create special hardships. They may have family and friends in Canada but not in the third country. The very statutory basis for the self-exiled class is that their acceptance "would be in accordance with Canada's humanitarian tradition with respect to the displaced and the persecuted".[129] Canada has established a presumption that persons within this class are "displaced and persecuted" and that it would be "humanitarian" to admit them. In this context, the application of the general proscription against landing from within Canada may be questionable.

To make this general policy inapplicable to the self-exiled class would not lead to the same situation that occurred in the past. Landing is now available from within Canada to those who can establish that they have a "well-founded fear of persecution...".[130] Should it not also be available to those whom Canada has, in effect, presumed to be persecuted?

One response to the problem has been to continue the general requirement that the immigrant visa be obtained at a post abroad but to permit the processing of the application of a self-exiled person to occur in Canada.[131] The applicant is permitted to remain in Canada with family and friends while medical and background checks are being done. When the application is approved, he leaves for the third country, frequently Austria, simply to obtain his visa and return.

Since this procedure is analogous to the "Buffalo Shuffle", it has been described as the "Vienna Waltz". It does have the advantage of allowing the self-exiled person to remain in Canada, rather than in the third country, while waiting for his visa application to be processed. However, the expense and effort of returning to the third country seem pointless.

The "Buffalo Shuffle" is necessary to meet the legal requirements of the Act itself. Once a person has been ordered removed from Canada, a Minister's permit cannot be issued.[132] Therefore, even though a decision may have been taken to grant the person a Minister's permit, he must first leave the country and then return. There is no such requirement in relation to the self-exiled person.

The very purpose of requiring that immigrants obtain visas abroad is to keep them abroad until the application is processed. In that way, the creation of humanitarian grounds will be avoided in the event that the application is refused. However, if the applicant is to be permitted to remain in Canada while the processing is done in Canada then, in the view of the Task Force, to return to a third country to collect the visa does not seem to have a justifiable purpose.

Recommendation: A member of the self-exiled class should be entitled to have an application for landing, which is made from within Canada, considered on the same grounds as an application made from a third country.

C. The Visa Requirement

The impact of a visa requirement upon refugee claims was referred to at the beginning of this chapter. The basic problem is that a potential refugee claimant, who seeks a tourist visa from a Canadian embassy, will normally be denied the visa if it appears that he wishes to come to Canada in order to claim refugee status. Since he cannot make a refugee claim in his own country (unless it is Uruguay, Argentina or Chile), he is, effectively, precluded from making a refugee claim in Canada. In other

words, refugee inflow to Canada is effectively cut off from countries with visa requirements.

For instance, there is a visa requirement for El Salvador. In spite of the existence of the temporary humanitarian program for El Salvador, our foreign visa officers are instructed to examine any El Salvadoran abroad seeking a visitor's visa "as to the bona fides of the visit, likelihood of the submission of a refugee claim in Canada and assurances of intentions to depart upon completion of the visit...". The officer is instructed that refusal should result from any element of doubt.[133]

This approach can be criticized as indirectly denying relief to refugees which could not be denied directly. Once a refugee arrives in Canada, he cannot be forced to leave. However, by imposing a visa requirement, he is prevented from arriving in order to make the claim.

In response, it has been said that a visa requirement does not prevent a refugee from leaving home but only prevents him from leaving home to come to Canada. This prevents Canada from becoming a country of first refuge. This result may be justified on the basis that refugees in temporary refuge are best off waiting to return in a country which is near to their own and which is culturally similar. Proximate refuge will encourage repatriation, which is the most desirable solution to a refugee problem.

However, the policy of refusing visitors' visas to those with an expressed intention of seeking refugee status in Canada may also be seen as inconsistent with the position of others who seek visitors' visas. In general, a person will not be denied a visitor's visa simply because he wishes to land in Canada. A person may be a bona fide visitor even though he has a desire to

live in Canada permanently. In the words of Chief Justice Jackett, then of the Federal Court of Appeal:

> ...such a desire may be quite consistent with an intention to comply with Canadian law, and only remain, or return, at some subsequent time, as and when he is permitted to do so, in accordance with the law.[134]

Should not a potential refugee claimant be treated in a similar manner?

An intention to claim refugee status expressed to a visa officer abroad may be quite consistent with an intention to comply with Canadian law, i.e., to remain or to return at some subsequent time only as and when entitled to do so, in accordance with the law. A person does not have to break our laws in order to claim refugee status since a claim may be made "in status". In other words, a person can intend to claim refugee status in Canada and, no less, intend to comply with our laws in all respects.

The problem is that the normal visiting period is three months[135] whereas the current backlog in refugee claims means that a claim may take a year to process. A visitor not claiming refugee status but requesting landing from within Canada on humanitarian grounds will have a response within the authorized period of the visit.[136] A potential refugee claimant will not. Nevertheless, the Task Force is of the view that the length of our refugee determination process should not result in the denial of visitors' visas to those who would otherwise be admitted as visitors.

Recommendation: A person should not be denied a visitor's visa solely on the basis that he intends to claim refugee status once he arrives in Canada.

At the same time, the Task Force recognizes the very real danger of abuse. Anyone from a country without a visa requirement can come to Canada, claim refugee status and request a work permit. If the claimant has no other means of support, a work permit will normally be issued. If the refugee determination process is operating efficiently and without a significant backlog, such claims will be quickly identified and rejected, eventually discouraging others from making similar attempts.

Reference was made in Chapter Three to the RSAC practice of screening out "manifestly unfounded claims" as a response to the heavy volume of claims. However, the total time involved in the refugee determination process, even with screening, is so lengthy that screening cannot be viewed as an effective deterrent to the filing of frivolous claims. The recommendations in favour of greatly increased resources together with the broader changes advanced in the next chapter, would allow for a much quicker resolution of refugee claims.

However, the real threat to our present system occurs when abuse presents itself on a large scale. Even a massive infusion of resources will not be effective since rapid growth in the machinery of adjudication will, in itself, create delay and other problems. Mechanisms such as detention, the deposit of cash or a bond or the denial of work permits must all be applied in individual cases. They are not appropriate as a response on a broad basis.

Where there is a sudden increase in frivolous claims, they will frequently originate in a particular country or even a particular region of a country. With many people abroad who are eager to gain permanent entry into Canada, it may not take much encouragement for large numbers to react immediately to apparent "loopholes" which will permit entry. There

may also be a sense of urgency in wanting to act before the new avenue of hope is inevitably sealed off by the Canadian Government. Immigration officials have impressed upon members of the Task Force, the almost amazing speed at which new information and rumours of this nature will circulate by "word of mouth" in some regions. Occasionally, unscrupulous "consultants" and travel agents may act as catalysts.

In such circumstances, the problem must be met on a broad scale. Rather than leaving the problem to be met by the RSAC in a greatly increased volume of individual cases, it should be dealt with in the country of origin. This approach would also be a service to prospective claimants, who might otherwise spend considerable sums of money, only to learn that the Canadian refugee determination process is not, in fact, susceptible to such frivolous claims.

The Task Force is of the view that in situations of large scale abuse, the imposition of a visa requirement is an appropriate approach to the reduction of the flow of non bona fide refugee claims. The previous recommendation of the Task Force was that a person should not be denied a visitor's visa solely on the basis that he intends to make a refugee claim. Neither should a person be granted a visa for the sole purpose of making such a claim. The relevant consideration is whether, apart from his intended refugee claim, the person would otherwise be given a visa. While the distinction may appear to be subtle, in practice the impact would be substantial.

A visa requirement would not totally eliminate frivolous refugee claims. Those persons who do receive visitor's visas and arrive in Canada could still make a refugee claim even though there were no valid basis for

doing so. However, the number of potential, frivolous claimants would be greatly reduced. Moreover, those granted visas would normally have accompanying means of support or relatives in Canada who could support them. Work permits could, in good conscience, be denied to such claimants since they would not need to work in order to survive.

However, the imposition of a visa requirement will not eliminate the problem. While the problem is removed from the ports of entry, it is relocated to posts abroad. Wherever a visa requirement is imposed, additional resources must be allocated to posts abroad for the processing of visa applications. However, when the alternatives are providing such resources to process visa applications abroad and permitting uncontrolled entry into Canada in violation of the principles of the Immigration Act, the choice is clear.

Recommendation: The Government of Canada should impose a visa requirement on the citizens of any country generating a significant volume of frivolous refugee claims, where the government of the source country is not a gross and flagrant violator of human rights.

D. Family Reunion

The visa requirement may prolong a family separation. A refugee claimant in Canada without his family may wish to have the other members of the family join him while his claim is being determined. If the family is in a country with a visa requirement, the family will not be allowed to come to Canada. A family member coming to join a refugee claimant is not

considered a genuine visitor, because he would wish to stay in Canada provided the refugee claimant is himself allowed to stay in Canada.

Family separation represents one of the acute hardships of refugee claimants. The length of time in processing a claim, particularly one which is not "manifestly unfounded", can result in prolonged family separation. While a refugee claimant may be entitled to remain in Canada and to work while his claim is being processed, he is not entitled to have his family join him.

Families abroad of claimants in Canada are not familiar with the refugee claims procedure and its delays. When a refugee claimant does not bring his family over for some time after he himself has arrived, the spouse in the home country may tend to believe that the spouse in Canada is deliberately delaying the reunion or that there has been desertion. Marriages may founder. Even where that is not a problem, family separation over a long period of time may add to the stress of flight, cultural shock and the anxiety of awaiting a determination of refugee status. Claimants who are accompanied by their families may be better able to withstand the stress of the whole refugee experience.

The disadvantage of family reunion pending determination of the claim is that it may eventually be denied. Meanwhile, the family may have established ties in Canada and severed ties with the home country. Humanitarian grounds would have been created by the system, in favour of allowing the entire family to remain.

On the other hand, family reunion is not denied to all claimants right now. It is only denied to families in countries with a visa requirement.

If a claimant arrives without his family from a country without a visa requirement, the claimant can bring his family over at any time to join him. Moreover, if the claimant should arrive with his family, the other family members are also permitted to remain pending the determination process, whether or not they also make individual claims.

The comments in the previous section are also apposite here. An intention expressed by a family member to a visa officer abroad to reunite with the refugee claimant in Canada may be quite consistent with an intention to comply with Canadian law and only remain and return at some subsequent time as and when the family member is entitled to do so in accordance with the law. A family member should not be denied entry to Canada solely on the basis that he would want to remain, should the refugee claimant be given refugee status.

Recommendation: A family member abroad of a refugee claimant in Canada should not be denied a visitor's visa solely on the basis that he would wish to remain in Canada should the claimant be given refugee status.

CHAPTER SIX

AN ENTIRELY NEW PROCESS

Amongst the basis requirements recommended by the UNHCR for a refugee status determination process which would ensure impartiality, objectivity and equality of treatment before the law is the following:

> There should be a clearly identified authority — wherever possible a single authority — with responsibility for examining requests for refugee status and taking a decision in the first instance.[137]

Theoretically, that is the case in Canada since the Minister is the single authority for examining the request and making the decision. The senior immigration officers, the RSAC and the Minister's delegate within the Commission can simply be viewed as extensions of this single authority.

However, the submission which the Task Force received from the UNHCR Branch Office provided another perspective on the process in Canada:[138]

> In practice, it is our opinion that these tasks of gathering information, examining it, and finally reaching a decision on its basis, are divided to the extent that the value of each previous step is diminished by factors of distance, time, people.

With respect to the reliance upon transcripts, it adds:

> Our experience, after studying hundreds of transcripts of examinations under oath, has not satisfied us that a transcript truly reflects the history and motives of an applicant. As well, we have observed the same uneasiness on the part of some RSAC members.

While the system of examination by senior immigration officers and the review of transcripts by the RSAC may have served adequately in a

transitional phase, the Task Force is of the view that the time has now come to establish a full hearing process at the first level of refugee determination.

The Immigration Act should be amended to eliminate the present three-stage process of refugee determination. It should be replaced by a single body to hear and decide all refugee claims. The present RSAC could be transformed to fulfill such a function.

The existing process embodies the highly desirable feature of centralization and, as a result, a high degree of uniformity in decision-making. The Task Force is of the view that such a feature should be continued under a new regime. If, on the contrary, regional authorities were established with full power to examine and decide, consistency would suffer. The experience which the decision-makers would accumulate would not be as great as with a central system and country background information, now centralized in Ottawa, would have to be circulated to each local authority.

Is a single, central authority possible for Canada? Our large distances mean that if there were such an authority, either the authority itself or the claimants would be involved in extensive travelling. However, a central authority with panels or even individuals travelling to sit in various parts of the country is not objectionable. In fact, there are a number of prototypes amongst federal administrative tribunals.

If this recommendation is ultimately adopted, consideration should be given to tandem changes to the role of the IAB in relation to the review of refugee claims. The task force is of the view that if a full hearing is provided at the initial level, the concept of a "redetermination" by the IAB should be eliminated. If the initial determination is to be made by an individual member of the "refugee determination tribunal" an appeal might be

provided to a full panel. The role of the IAB would be eliminated and subsequent review would be available only at the Federal Court level.

Recommendation: The Immigration Act should be amended to replace the present refugee determination process with a central tribunal which would hear and determine refugee claims. If such a full hearing process is established at the first level of refugee determination, the concept of a redetermination should be eliminated.

CHAPTER SEVEN

CONCLUSION

Our existing refugee determination process, with its fragmentation and reliance upon transcripts, is inherently slow. The delay in processing claims has been compounded by current backlogs in the system which have reached serious proportions.

The Task Force has been advised that, currently, it takes about five months from the time the claim is made to the time the transcript reaches the RSAC in Ottawa. It takes another five or six months for the RSAC to consider the claim and advise the Minister. The decision of the Minister or his delegate can take another month. If the decision is adverse, the claim automatically goes to the Special Review Committee, which takes from five to eight weeks to examine the case. In the end, the average time from the making of the claim to the ultimate communication of an adverse decision to the claimant is well over a year.

The Immigration Appeal Board does not have a backlog. An application to proceed will be examined and disposed of within six weeks of the date it is made. If the application is allowed to proceed, the hearing is held, on average, about five months after the decision to allow the application to proceed.

Delays in the ultimate disposition of refugee claims can create, not only hardship for the claimant and his family, but also difficulties for the system. A person who has claimed refugee status and who is awaiting the disposition of his claim may be given a work permit.[139] Since anyone in Canada or at a port of entry may claim refugee status, there is a danger of

growing numbers of persons coming to Canada and working for longer periods of time as delays in the determination process increase. The longer it takes to process a claim, the more unfair it is to deny the claimant a work permit while he is awaiting the outcome. The longer a person remains and works in Canada, the more difficult it becomes to require him to leave, quite apart from the question of refugee status.

The basic changes suggested in the previous chapter could substantially reduce such delays. Reliance upon the transcript would be eliminated. The body which hears the claimant in the first instance would make the determination. There would be no need for the Minister to be involved in refugee determination. The Special Review Committee's role in relation to humanitarian and compassionate grounds would be carried out quite independently of the refugee determination process. There would be no redetermination by the IAB.

However, the implementation of this basic change would require amendment of the Immigration Act.

How would the other changes recommended in this Report affect the problem of delay in processing claims? Perhaps the most significant of the earlier recommendations is that a refugee claimant should be entitled to a hearing in every case where the RSAC is not prepared to make a positive recommendation on the basis of the transcript. Within the constraints of its present capacity and resources, it would simply be impossible for the RSAC to adopt this recommendation.

However, with adequate personnel and resources, the backlog could be eliminated and the introduction of oral hearings need not lengthen the process significantly. It should be borne in mind that the hearing which is

contemplated is only supplemental to the examination and only in cases where the RSAC is not prepared to make a positive recommendation on the basis of the transcript. The transcript will have been read in advance by the RSAC panel and will be considered to have been introduced as evidence at the hearing. The claimant will be informed of the specific problems which the panel has with his claim. Moreover, to provide such a hearing at this stage may reduce the time which the Minister's delegate may have to spend on claims and may also reduce the number of applications for redetermination by the IAB.

In the end, then, the question is one of resources. Would the additional expenditures be warranted? How does one do a cost-benefit analysis where the "benefit" is to be found in vague concepts, such as "fairness" and "justice"? One approach may be to canvass other forms of adjudication by federal tribunals and compare the significance of their decisions and the kinds of hearings which they offer with those of the refugee determination process. Without referring to specific bodies or in any way denigrating the importance of their work, the impact of their decisions often pales in comparison to refugee determination. Yet they generally offer far more in the way of procedural fairness.

In the view of the Task Force, adequate personnel and resources should be allowed to the RSAC to permit it to eliminate its current backlog and to provide oral hearings as recommended. As Lord Atkin has stated: "Convenience and Justice are often not on speaking terms." There is a danger that mounting backlogs may place a premium on expediency. RSAC members should not be placed in the position of being tempted to weigh the injustice of an incomplete hearing against the injustice of delay.

Canada has been generous, and more than generous in its resettlement of refugees. It is one of the leading refugee resettlement countries in the world. We should strive for the same reputation in the real and apparent fairness of our refugee claims procedure.

A determined effort should be made to avoid the danger which has been described by Frances D'Souza in The Refugee Dilemma, a report of the Minority Rights Group. Reference is made to two distinct refugee categories, namely: (1) those who are part of a mass movement provoked by invasion or oppression; and (2) those individuals who claim to have escaped persecution in their own country. The author points out that members of the former group are quickly recognized as refugees while the latter may have great difficulty in achieving recognition of their refugee status. D'Souza notes that is quite possible for a country to have impeccable legislation incorporating the directives of the UN Convention on Refugees and its protocol, and yet to refuse admission in the most obvious cases of persecution. Such a danger must be avoided in Canada.

It is interesting to note that the vast majority of refugees have come to Canada under special programs rather than through the refugee determination process established in the Immigration Act. The Annual Report to Parliament on Immigration Levels, 1981, shows that in the first six months of 1980 Canada admitted 26,226 refugees. Of these refugees, 25,981 or 99% came by way of special programs. Only 245 or 1% came by way of the regular procedures for claiming refugee status in Canada or by requesting resettlement in Canada from abroad.

The rejection rate of refugee claims in Canada has been high. The Minister rejected 70.2% of all claims made from within Canada which

were concluded in 1979. He rejected 73.8% of all claims made within Canada which were concluded in 1980. The Immigration Appeal Board rejected, without a hearing, 70% of the applications for redetermination of which it disposed in 1980. Of those, which were heard, the Board rejected 60% as not being refugees.

Critics of our refugee determination process have pointed to these figures as support for the view that determinations are not being made accurately. However, they are equally consistent with the conclusion that by far the majority of refugee claims are simply not well-founded. Nevertheless, such criticisms will be better met if our refugee status determination process meets the same high standard of fairness which has been adopted in other areas of adjudication by federal tribunals.

FOOTNOTES

1. S.C. 1976, c. 52, s. 4(2)(b). See also the discussion in Chapter Three under the heading: E. The Right to Remain.

2. Wydrzynski, "Refugees and The Immigration Act" (1979) 25 McGill L.J. 154, at p. 166.

3. At p. 72.

4. Louis Paul Mingot, 8 I.A.C. 351, at p. 356.

5. Re Salvatierra (1980) 99 D.L.R. (3d) 525.

6. See, for example, MMI v. Fuentes, [1974] 2 F.C. 331.

7. Ernewein v. MEI, [1980] 1 S.C.R. 639, at 662. Pigeon J. dissenting, but not on this point. The majority did not comment on this point.

8. Convention, Article 1, C(5).

9. Atle Grahl-Madsen, The Status of Refugees in International Law (1966) Volume 1, pp. 410-11.

10. IS 3.25 - 3.28.

11. IS 13.06 - 13.09.

12 Diaz-Fuentez (1975) 9 I.A.C. 323.

13. Grahl-Madsen, supra note 7, at p. 187.

14. Ibid. at p. 179.

15. Ibid. at p. 220.

16. Ibid. at p. 195.

17. Ibid. at p. 200.

18. Ibid. at pp. 115-16.

19. Ibid. at pp. 189-92.

20. Ibid. at p. 201.

21. Ibid. at p. 82.

22. Ibid. at p. 179.

23. Ibid. at p. 250.

24. Astudillo v. MEI, (1979) 31 N.R. 121; Inzunza v. MEI, (1980) 103 D.L.R. (3d) 105.

25. Grahl-Madsen, at pp. 186-7.

26. Ibid. at p. 179.

27. Ibid. at p. 94.

28. Ibid. at p. 76.

29. Ibid. at p. 208.

30. Ibid. at p. 250.

31. Re Salvatierra, (1980) 99 D.L.R. (3d) 525.

32. R. v. Brixton Prison Governor, ex parte Ahson, [1969] 2 All E.R. 347, at 351, per Lord Parker C.J.

33. Maria v. Dennis, [1950] 2 W.W.R. 577, at 578, per Campbell J., aff'd [1951] 1 W.W.R. 513.

34. See IS 16.11.

35. IS 18.14(1)(a)(i).

36. IS 18.14(1)(a)(ii).

37. IS 18.14(1)(b)(ii).

38. "S.I.O. Gonzalez Examination" Training Directorate. 1980. At p. 20.

39. Ibid. at p. 32.

40. These are set out in Immigration Practice & Procedures, Law Society of Upper Canada, October, 1970, at pp. D-74, D-75.

41. Gonzalez Examination, at p. 7.

42. Ibid. at p. 8.

43. Ibid. at p. 12.

44. Ibid. at pp. 3, 8.

45. Ibid. at p. 14.

46. Supra text, p. 1, at p. 47.

47. Ibid. at p. 48.

48. Supra note 38, at p. D-74.

49. Ibid. at p. D-80.

50. Gonzalez Examination, at p. 3.

51. Appendix E, infra at p. 127.

52. Section 48(2).

53 IS 13.19(2)(c).

54. Article 1(c)(5).

55. Section 45(4).

56. Supra note 44.

57. Saraos v. MEI, A-665-80.

58. Speech of the Secretary of State for External Affairs to the Canadian Human Rights Foundation, March 27, 1981.

59. Gonzalez Examination, at p. 20.

60. Browne v. Dunn, (1893) 6 R. 67, at pp. 68-9, per Lord Herschell, adopted by Duff J. in Peters v. Perras, (1909) 42 S.C.R. 244.

61. Instrument 1-4, Immigration Manual 1L3. For discussion of the legal validity of this delegation, see Re Inzunza, (1980) 103 D.L.R. (3d) 105, at p. 107; Mensah v. MEI, A-524-80; de Smith, Judicial Review of Administrative Action, 4th ed., at p. 308.

62. Press Release 79-42, Minister of Employment and Immigration, November 5, 1979.

63. Section III(c).

64. Supra, at p. 2. The discussion which follows assumes that the claim has not been made "in status". In status claims are discussed under the next heading.

65. Boun-Leua v. MEI, (F.C.A.) A-578-79. But see Dmitrovic v. MEI, (I.A.B.) 80-6094.

66. Section 46(2).

67. Section 47(2).

68. Section 47(3).

69. IS 13.19(3).

70. Section 72(2).

71. See the Statute of the UNHCR, c. 1, para. 1.

72. IS 13.14(2)(a).

73. IS 13.14(3).

74. Reg. 19(3)(f).

75. IS 13.19(2)(a).

76. Supra note 38, at pp. D-17, D-18.

77. IS 13.14(2)(e).

78. Reg. 40(1).

79. Section 71(1).

80. Section 11(1)(c) of the Immigration Act, enacted by S.C. 1973, c. 27, s. 5.

81. Section 11(2).

82. Section 11(3).

83. (1975) 9 I.A.C. 323.

84. MMI v. Fuentes, [1974] 2 F.C. 331, at 334, fn. 2.

85. Cf. Saraos A-665-80.

86. Kwiatowski v. IAB. (1981) 34 N.R. 237 (F.C.A.). Leave to appeal to the Supreme Court of Canada has been granted.

87. Villaroel v. MEI, (1980) 31 N.R. 50, at p. 53, per Pratte J.

88. MMI v. Brookes, [1974] S.C.R. 850, at p. 865, per Laskin J. Cf. R. v. Cole, (1980).

89. Re Salvatierra, (1980) 99 D.L.R. (3d) 525, at 528.

90. R.S.C. 1970, c. 1-3, s. 15(1)(b)(i).

91. S.C. 1973-74, c. 27, s. 6, amending s/ 15(1)(b)(i).

92. Maslej v. MMI, [1977] 1 F.C. 194.

93. Saddo v. MEI, A-547-80 (F.C.A.).

94. Hernandes v. MEI, 79-1140, 70-1141 (I.A.B.).

95. Section 71(4).

96. Federal Court Act, R.S.C. 1970 (2nd Supp.) c. 10, s. 28(2).

97. Valahou v. MMI, [1977] 2 F.C. 225, at p. 227.

98. Federal Court Act, s. 52(d).

99. Federal Court Act, s. 28(1).

100. Federal Court Act, s. 31, as amended by S.C. 1974-5-6, c. 18, s. 9(2).

101. SOR/79-932.

102. Reg. 13(1).

103. Immigration Act, s. 9(1).

104. H. of C. Deb., December 5, 1980, at p. 5434.

105. Article 1(a)(2).

106. Reg. 7(3).

107. IS 3.08(1).

108. IS 3.30(2).

109. IS 3.26.

110. Raoul Sylt, Asylum in Canada, Vol. II, at p. 5.

111. Immigration Act, ss. 47(3), 4(2).

112. Ibid., s. 19(1)(a)(ii).

113. Ibid., s. 19(1)(a)(i).

114. Reg. 7(3).

115. Refugee Convention, Preambular Paragraph 4.

116. IS 3.07(4), 3.11, 3.33, 15.29(2).

117. IS 3.34(1).

118. IS 3.34(2).

119. IS 15.29(2)(c).

120. IS 15.08(2)(b).

121. Section 37(1)(6).

122. IS 10.10.

123. Operations Memorandum (OM): Immigration Selection (IS) 41.

124. All of these provisions are specified in OMIS 41.

125. SOR/78-932.

126. Press Release 81-5, Minister of Employment and Immigration, March 2, 1981.

127. SOR/78-933, SOR/78-931.

128. Section 9(1).

129. Immigration Act, s. 6(2).

130. IS 13.19(1)(a).

131. IS 53.

132. Immigration Act, s. 37(2).

133. Supra note 112.

134. Sai Yau Gan v. MMI, (1974) 47 D.L.R. (3d) 629, at 633.

135. Immigration Act, s. 26(2).

136. IS 1.39.

137. Supra text, p. 1, at p. 46.

138. Appendix E, infra at p. 126.

139. Reg. 19(3)(f).

APPENDIX "A"

PERSONAL MEETINGS

In the preparation of this Report, members of the Task Force have had the benefit of personal interviews with the following:

a) S. Davis and R. Terrillon of the United Nations High Commissioner for Refugees;

b) K. Brown, Chairman of the Refugee Status Advisory Committee, K. Kaplansky, M. Molloy, C. Chatillon, members of the Refugee Status Advisory Committee, and R. Nichol of the RSAC Secretariat;

c) J. Bissett, Director General Foreign Branch, Department of Immigration;

d) A. Grahl-Madsen, author of The Status of Refugees in International Law;

e) B. Jackman, N. Goodman, and I. Bardin, Toronto immigration lawyers;

f) G. Cram, K. Ptolemy, M. Schelew, and G. Bell of "A Delegation of Concerned Church, Legal, Medical and Humanitarian Organizations";

g) J. Scott, Chairman of the Immigration Appeal Board;

h) L'Association des Avocats en Immigration.

Their kind assistance is gratefully acknowledged.

APPENDIX "B"

SPECIAL REVIEW COMMITTEE TERMS OF REFERENCE

(Circular Message dated January 9, 1980)

1. For your guidance, I am citing hereunder the revised Terms of Reference of the Special Review Committee which the Executive Director, Immigration & Demographic Policy, recently approved. Article I(b) was reworded to alleviate any confusion as to the proper review mechanism for special program cases such as Lebanese, Iranians, etc. and clearly establish the areas of concern. Article I(e) was added to provide a capacity for the review of situations of de facto residence in which removal would clearly cause hardship.

2. Terms of Reference

I The Special Review Committee will review:

(a) all applications seen by the Refugee Committee and found not to be refugees.

(b) applications by individuals who have not submitted a claim to refugee status and

(i) are from countries designated in the Indochinese Designated Class Regulations, the Latin American Designated Class Regulations or the Self-Exiled Persons Class Regulations, or

(ii) are from countries concerning which special temporary humanitarian procedures are established from time to time, e.g., Iran.

(c) applications from nationals of any country which has severe exit controls.

(d) applications from any country where a Regional officer wishes to have special guidance.

(e) applications by individuals who have established long term residence in Canada without having been granted legal admission as a permanent resident or visitor and who have voluntarily come to the attention of the Commission.

II In order to approve applications the Committee will be guided by criteria outlined below:

(a) where the claim of oppression (as opposed to personal persecution) in the applicant's own country is so rigorous or severe as to make it inhumane to return the applicant.

.../2

(b) persons from countries with severe exit controls who have overstayed their visit in Canada and who as a result of returning home would suffer punishment of an inordinate severity in relation to their offence of overstaying.

(c) persons who could not apply for an immigrant visa from their own country but had they been able to do so would have met our selection criteria.

(d) persons who because of some special family situation within Canada should be allowed to remain.

(e) persons who are members of official delegations, athletic teams or cultural groups, etc., who by seeking to remain in Canada so embarrass their Government as to leave themselves open to severe sanctions should they return home.

(f) persons requiring some special form of care that is available and offered in Canada and which is not available in their own country.

(g) persons who have achieved success in their own country, but who nonetheless articulate a clearly felt need to live in a democratic system and demonstrate that they are prepared to sacrifice to achieve this desire.

3. This CM may be cancelled when advised by FBHQ.

APPENDIX "C"

AUGUST, 1980

MANIFESTLY UNFOUNDED CLAIMS

G U I D E L I N E S

It is fully appreciated that all refugee claims merit careful and compassionate consideration, and that, normally, such consideration should be given by the Refugee Status Advisory Committee even where the claim may appear to have very little substance.

There are, however, a number of types of refugee claims where no useful purpose would appear to be served by following the standard procedure. It is, therefore, proposed that claims deemed to be in the following categories will be presented to members at their regular meetings in a brief resume form containing well defined reasons why the claims should be disallowed:
(In some cases, the members may decide to change the reasoning or ask for a full review of the claim.)

(a) originate in freely elected parliamentary style democracies where fundamental human rights and freedoms are enshrined in legislation and safeguarded on a non-discriminatory basis by an independent judiciary;

(b) contain no claim to, or indication of, fear of persecution for reasons contained in the definition of a Convention Refugee;

(c) are made by claimants whose claims indicate clearly that they are so mentally ill that their fears of persecution originate from their affliction rather than any real or external causes;

.../2

(d) originate from persons seeking temporary haven because of civil wars, natural disasters or other causes unrelated to persecution. (Such persons may still be permitted to remain in Canada on other grounds or under special programs designated by the Minister);

(e) are the second claim made under transitional or other arrangements and which contain no new evidence or information which would provide a basis for a change of the rsac's original negative decision;

(f) are made by spouses of those claimants whose claims have already been considered and rejected by the RSAC, where the second claim is based solely on the possible persecution claimed by the first claimant;

(g) a person who admits that he/she has not been involved in any activity against the regime of the country of his/her nationality or habitual residence and/or has not been persecuted.

APPENDIX "D"

FORM RE IN STATUS CLAIMS

Je déclare avoir été informé des dispositions des Articles 45, 46 et 70(1) de la Loi sur l'immigration de 1976 et je reconnais que n'étant pas le sujet d'une enquête, si ma revendication au statut de réfugié est refusée par le Ministre, je n'aurai pas droit de demander un réexamen de ma revendication au statut de réfugié à la Commission d'appel de l'immigration.

_____
Signature

_____
Témoin

Je, ..., déclare solennellement que j'ai interprété fidèlement et correctement le contenu de la présente, dans la langue du sujet, et il/elle m'a informé qu'il/elle comprend parfaitement le contenu de ce document.

_____
Signature de l'interprète

_____
Date

2014-4535 (3/78)

APPENDIX "E"

UNITED NATIONS
HIGH COMMISSIONER
FOR REFUGEES
Branch Office for Canada

NATIONS UNIES
HAUT COMMISSARIAT
POUR LES RÉFUGIÉS
Délégation pour le Canada

SUBMISSION BY THE U.N.H.C.R. BRANCH OFFICE
CANADA TO THE TASK FORCE ON IMMIGRATION
PRACTICES AND PROCEDURES

February, 1981.

SUBMISSION BY THE U.N.H.C.R. BRANCH OFFICE CANADA
TO THE TASK FORCE ON IMMIGRATION PRACTICES AND PROCEDURES

I. INTRODUCTION

While the 1951 Convention and the 1967 Protocol relating to the Status of Refugees are silent on what type of procedures are to be adopted for the determination of refugee status, it is obvious that some machinery must be developed to enable states parties to identify those to whom these international instruments apply.

Such procedures are in themselves, a vehicle for the states parties to be used toward reaching the goal of fulfilling their obligations under the 1951 Convention and 1967 Protocol. Since, by Arts. 35 of the Convention and II of the Protocol, states parties thereto have undertaken to facilitate inter alia the duty of the UNHCR in supervising the application of the provisions of the 1951 Convention and 1967 Protocol, the UNHCR is of course, pleased to be given the opportunity of commenting on the procedures used in Canada for identifying refugees.

It is our understanding that this Task Force "will advise the Minister on the extent to which the objectives of the Immigrat Act (1976) are being met under existing regulations, procedures and practices".(1) Of direct concern to the Office of the UNHCR is the objective stated in Section 3(g) of the Act, that is :

> "to fulfil Canada's international legal obligations with respect to refugees ..."

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(1) Press Release from Minister of Employment and Immigration, 22 September, 1980.

The first requirement for which we believe a comment is warranted concerns the need to provide to the applicant "the necessary guidance as to the procedure to be followed" (our emphasis). In this regard we can point to the co-operation of the Canadian Immigration authorities and the Office of the UNHCR in the preparation of a pamphlet explaining the refugee determination procedure in a variety of languages.

We believe it should be a strict practise that these pamphlets are made readily available to an applicant both at a port of entry and Immigration Centres. Applicants for refugee status, or would-be applicants, are often nervous, inarticulate, and/or incapable of speaking either official language and therefore must be offered the information even when it is not requested.

It has been our experience as observer and adviser of claims considered by the RSAC that an applicant will give as his reason for not applying for refugee status upon arrival, that he/she was not familiar that such a procedure existed in Canada. The better and wider the practise is of distributing these pamphlets, the easier and more reliable will be the judgement that such an assertion is not credible.

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The second requirement we wish to apply to the Canadian situation is that by which there should be a clearly identified authority - wherever possible a single central authority - with responsibility for examining requests for refugee status and taking a decision in the first instance. From our vantage point as observer and adviser at RSAC meetings, we are able to offer the following comments concerning this stage of the process:

The Executive Committee's recommendation included the suggestion that a single authority be responsible for both examining requests and taking decisions. In a sense, such is the case in Canada, where all Immigration Officers participate in this process which leads to a decision being made in their Minister's name.

The Office of the UNHCR wrote in its "Handbook on Procedures and Criteria for Determining Refugee Status" that claims to refugee status should "be examined within the framework of specially established procedures by qualified personnel having the necessary knowledge and experience and an understanding of the applicant's particular difficulties and needs".
It is the emphasised part of the quotation which we believe bears special consideration by the Task Force.

So that the Task Force may have ascomplete picture as possible we also suggest that it examine the following practices within the Canadian procedure for determining refugee status :

1. The practice used by the RSAC secretariat to screen transcript in order to determine which merit full review by the RSAC and which are put forward to the RSAC as manifestly unfounded.

2. The practice used by the RSAC secretariat to gather independent material to corroborate statements made by the applicant, i.e. what sources are consulted; whether all transcripts are thus screened; what happens to the information once received.

3. The practice by which certain information is made available to the RSAC members, but not to the UNHCR observer and adviser. We fully appreciate that classified information is not for our eyes. However, where information is made known to the RSAC members and not to ourselves, we believe it inhibits our ability to properly advise the RSAC. Certainly the UNHCR is doing its best to make available to the RSAC all general and specific relevant information which it has access to, and which will assist them in reaching fair recommendations.

4. The practice used in formulating the slate of claims to be considered at each RSAC meeting, i.e. what factors, once a transcript has been received by the RSAC secretariat determine when the claim it relates to will be considered by the RSAC.

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Another requirement recommended by the Executive Committee concerns the necessity of providing the applicant with "the services of a competent interpreter, for submitting his case to the authorities concerned". Within the Canadian context we suggest that the Task Force examine the competence of translator used both at ports of entry and at examinations under oath. This suggestion is based on complaints we receive from claimants and from our study of transcripts of the examinations.

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We would like to go behind the recommended requirement that :

> "If the applicant is recognised as a refugee, he should be informed accordingly and issued with documentation certifying his refugee status."

The importance of this requirement is that it provides the refugee with a document that can protect him against certain dangers (i.e. refoulement) and can identify him to the authorities as one entitled to certain rights.For refugees identified outside Canada and admitted for permanent resettlement in Canada, the document takes the form of a landing certificate by which the refugee enters as a landed immigrant entitled to rights and privileges accorded to all landed immigrants.

Refugees recognised as such through the S.45 procedure, (that is, inside Canada) are issued with Minister's Permits to legalise their presence in the country, but must await receiving landed immigrant status - a procedure which can take up to two years.

The practical consequences of this inconsistency is that the "S.45" refugee suffers hardships unknown to the refugee arriving in Canada as a landed immigrant. In our experience we have seen that for example, professional associations will only offer

membership and its benefits to landed immigrants. Therefore a refugee who is recognised as qualified to begin a medical internship by the association, must await landing before beginning the internship. Likewise refugee students must await landing to avoid paying the same fees paid by foreign students. As well, such refugees must await landing by Order-in-Council to begin the sponsorship procedure by which they will be reunited with their families.

We therefore ask the Task Force to study the practise used to process the landings of refugees, so that such inconsistent treatment may be remedied, and the quality of the lives of the latter "category" of refugees, substantially improved.

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Our final comments concerns the requirement recommended by the Executive Committee that :

> "If the applicant is not recognised, he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing system."

Regarding the question of "reasonable time", we believe that S.40(i) of the Immigration Regulations, 1978 should be amended. As it now stands, applicants not recognised by the Minister have seven days within which to apply to the Immigration Appeal Board for a redetermination of his claim. We find this time limitation restrictive, keeping in mind that it is applied to persons who are unlikely to be able to respond quickly because of their particular anxieties and fears. In addition, one should take into account that such persons may not have had the benefit of a lawyer and therefore may not be equipped to prepare the necessary documentation in time.

It is suggested therefore that the applicant be given thirty (30) days to make his application to the Immigration Appeal Board for a redetermination of his case.

This requirement that the applicant be given an opportunity to appeal for a reconsideration of his case is in a strict sense being fulfilled by the Canadian system. However, we believe that the same comments which we made concerning the RSAC and its secretariat apply to the IAB and its secretariat.

If one accepts that those who deal with a claim to refugee status at the first instance should be expert in international law relating to refugees, knowledgeable about conditions in other countries and able to have access to comprehensive information on such conditions, and be aware of the problems of the refugee claimant, one must encourage and expect the same expertise from those who deal with the claim on appeal.

The requirement for specialisation at this stage of the process seems to be even more imperative given the fact that the claim is considered by the RSAC without the personal presence of the applicant, and that the law does not provide an automatic grant of a full hearing after a negative determination by the Minister. A reconsideration under these circumstances should surely be done by persons who have the resources and time to devote completely to the claims of others who stand to lose so much from a negative decision.

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We have not found it necessary to comment on the application in Canada of the two remaining requirements which the Executive Committee recommended. They concern the treatment of a refugee

claimant at ports of entry and permitting the claimant to remain in the country pending the outcome of his appeal.

We believe that the regulations, procedures and practices under the Immigration Act (1976) fulfil these requirements. It has been our experience that generally those charged with the duty of carrying out the Act have done so with understanding that exceeds these two requirements and we hope this practice will continue.

Finally we wish to congratulate the Canadian Government for its constant efforts to fulfil its international obligations under the 1951 Convention and 1967 Protocol. We have no doubt that the advice of the Task Force will be of great assistance to that end and we hope that our comments will provide some constructive help as well.

Le présent document est disponible également en français sous le titre
«Reconnaissance du Statut de Réfugié»
Emploi et Immigration Canada
Division des affaires publiques
Place du Portage, Phase IV
Ottawa — Hull
K1A 0J9

Canada